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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1600

BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
*Petitioners,*

v.

ENGINE SPECIALTIES, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

*Of Counsel:*

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners Bombardier Limited and Bombardier East, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit entered on July 25, 1979.

## OPINION BELOW

The opinion of the court of appeals is reported at 605 F.2d 1 (1st Cir. 1979). It is reproduced as Appendix A (pp. A1-A40).

## JURISDICTION

The corrected judgment of the court of appeals was entered on July 26, 1979, nunc pro tunc July 25, 1979,

and is reproduced as Appendix B. An application for rehearing was denied by order on February 21, 1980, which is reproduced as Appendix C. On March 3, 1980, the court of appeals filed an order staying its mandate pending the disposition of a petition for writ of certiorari to be filed by April 14, 1980. The order is reproduced as Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## QUESTIONS PRESENTED

1. Is there a *per se* rule which prohibits a manufacturer from entering a new product market by means of a joint venture with a second manufacturer, which has a very small share of that market, instead of by manufacturing an untested prototype it had recently developed?



2. Where a joint venture agreement is found to constitute an unlawful division of markets, are the participants subject to treble damage liability to a plaintiff who was not injured by the elimination of competition between the participants and whose only injury is that it lost its position as distributor for one of the joint venturers?

## STATEMENT OF THE CASE

This case raises two important questions about the application of the antitrust laws to a business tort, which has converted an $85,000 tort judgment into an antitrust judgment of over $1.5 million. One question is whether the lower court erroneously developed a new *per se* rule; the other is whether the lower court erred in allowing treble damage recovery by a plaintiff that was not injured by those aspects of the defendants' conduct which, in the court's view, made that conduct a *per se* violation of the antitrust laws.

The plaintiff, respondent here, was a marginally profitable distributor of small motorcycles manufactured by two foreign companies. It won an $85,000 tort judgment by showing that Bombardier Limited, the principal petitioner, had induced one of the two manufacturers to break its contract with respondent and switch its distribution to Bombardier. The trial judge charged the jury that the new distribution agreement between the manufacturer and Bombardier was a *per se* division of markets if Bombardier, a snowmobile manufacturer, had the intent and ability to make small motorcycles. The jury found that Bombardier had such intent and ability, found that respondent was injured because of Bombardier's failure to bring out its own motorcycle product,

and awarded respondent $400,000, which the trial judge then trebled. The court of appeals affirmed. An attorneys' fee claim for $350,191, which does not include the appellate proceedings, is pending in the trial court.

The pertinent details are as follows:

The small motorcycle market in the United States, essentially started by Honda in 1960, had grown in size by 1970 to approximately 700,000 vehicles annually, most of them sold by Honda and three other large Japanese manufacturers. (A "small" motorcycle uses an engine with a piston displacement of up to 200 cubic centimeters (cc); full size motorcycle engines can run as large as 1500cc.) An Italian manufacturer, Agrati-Garelli, S.p.A., had been marketing small motorcycles and mopeds with 50cc engines in Europe for decades. Since 1967 it had sold annually between 2,000 and 3,000 small motorcycles with 50cc engines in the United States through respondent, its exclusive distributor. Respondent also distributed "minibikes"—simple, motorized, two-wheeled vehicles used by children—manufactured by another Italian company. In its best year, 1970, respondent's profit after taxes was $32,709. As of the end of 1970, both the 50cc motorcycle and the minibike were disappearing from the market.

In August 1970, Agrati approached Bombardier to discuss a joint marketing and manufacturing arrangement. Bombardier, located in Quebec, is the world's largest snowmobile manufacturer. Unbeknownst to Agrati, Bombardier had been searching for a summertime recreational product to smooth out the seasonal character of its distribution system in Canada and the northern United States. Although it had done no manufacturing, Bombardier had hand-built a prototype motorcycle which witnesses for both sides disparaged as crude and unmarketable. As an alternative to manufacturing this prototype, Bombardier was also investigating the possibility of distributing motorcycles made by other companies.



Bombardier was therefore interested in Agrati's joint venture proposal and offered to purchase for resale 7800 small motorcycles—over twice what respondent had been able to handle in a year—in the first year while a joint manufacturing arrangement was studied. Agrati agreed to this plan, appointed Bombardier its exclusive distributor in North America, and terminated respondent's exclusive distribution contract. Agrati and Bombardier hoped to pool Agrati's manufacturing know-how and Bombardier's snowmobile dealership organization so as to compete in the market dominated by the large Japanese manufacturers.[1]

Before Agrati terminated respondent's distribution contract, respondent had already been laying plans to distribute several new lines of small motorcycles with engines larger than 50cc built by its other supplier, and indeed a shipping schedule had already been drawn up. The new vehicles did in fact come on the market at about the same time Bombardier began distributing Agrati's motorcycles, and respondent sold about as many of the new motorcycles in 1971 as it had sold of the Agrati motorcycles the year before.

Respondent proceeded against Agrati before an arbitration tribunal in Europe, which ruled that Agrati had broken its distribution contract with respondent. The tribunal scheduled a hearing on damages, but meanwhile respondent had sued Bombardier in U.S. District Court for tortiously inducing this breach of contract and for

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[1] Under their arrangement, both parties would be free to distribute any motorcycles outside North America, even after the joint manufacturing enterprise began operating, and each could also distribute in North America any motorcycle of specified engine sizes, any of Bombardier's needs Agrati could not meet, and any other motorcycle the joint enterprise declined to distribute.

violating various antitrust laws. Banking on the treble damage features of the American antitrust laws, respondent kept postponing the arbitration. Finally, the Massachusetts case went to trial, and respondent secured a favorable verdict. The jury found that Bombardier had tortiously induced Agrati's breach and awarded respondent $85,000 as compensation for lost sales. The jury also found for respondent on two antitrust claims (which were charged in a single count) and awarded respondent $400,000, which was then trebled. Postjudgment motions were denied, and the court of appeals affirmed as to one of the antitrust claims, finding it unnecessary to rule on the other.[2]

The antitrust theory approved by the court of appeals was that Bombardier and Agrati had entered into a horizontal division of markets. The court reasoned that, because the jury found Bombardier to have had the intent and the ability to begin producing its own small motorcycle, it was a "potential competitor" of Agrati-Garelli's within the meaning of *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972). Therefore, said the court, the exclusive distributorship contract was a *per se* violation of the antitrust laws (as the trial judge had charged the jury) because competition that would otherwise have existed between a Bombardier motorcycle and Agrati's motorcycle had been eliminated. The court rejected Bombardier's argument that its exclusive arrangement with Agrati was part of a joint venture that should be analyzed under the rule of reason (*see United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964)) and that the arrangement should be upheld as a procompetitive attempt to gain a "toehold" in a market dominated by the Japanese companies (*see United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974)).[3] (605 F.2d at 7-11; App. A13-A21) Because respondent relied solely on the *per se* theory, it never undertook the impossible task of trying to prove that competition in the small motorcycle market had been adversely affected, even in the slightest degree, and the court's approval of that theory made this absence of proof immaterial.

On the question of injury, the jury expressly found that Bombardier's failure to bring out its own small motorcycle had caused respondent's injury.[4] The court

[2] The antitrust verdict was also rendered against copetitioner Bombardier East, Inc., a now-inoperative wholly-owned subsidiary of Bombardier Limited which had been the latter's distributor in Southern New England. Additionally, two of respondent's former subdistributors recovered a total of $122,000 before trebling. These judgments were reversed by the court of appeals on the ground that these two companies were not within the "target area" of the antitrust violation, and it was these parties who filed the unsuccessful application for rehearing that delayed entry of the court of appeals' judgment. *See* App. C.

[3] The court of appeals stated that Bombardier did not object to the trial judge's instruction that the agreement was a *per se* violation and hence waived its right to attack the instruction on appeal. (605 F.2d at 9 n.10; App. A15 n.10.) Although the court did not rest on this position and went on to decide the substantive issue, the court was incorrect in stating that Bombardier waived its objection. Through the trial Bombardier emphasized its reliance on *Penn-Olin* and expressly objected following the charge. Thus, counsel stated:

> "[A]lthough your Honor gave what I call the joint venture charge, I think our objection on that is the failure to connect that to the division of markets charge. I think the jury has the impression that the November 14th agreement is a division of markets and is a *per se* violation if, and only if, Bombardier was a potential entrant.
>
> "I think on the contrary, the document is, on its face, a joint venture agreement which can have a procompetitive effect even if it has an incidental division of markets flavor to it."

[4] Special interrogatory, No. 9 asked:

> "Regarding the first of plaintiffs' two conspiracy claims, was injury to plaintiffs' business or property proximately caused by Bombardier's not entering the market with cycles like the 'Fun-doo' of its own manufacture?"

(605 F.2d at 7, n.7, App. A11.) The jury answered "Yes" to this. *Id.* The "Fun Doo" was a name Bombardier's research staff had tentatively chosen for its hand-built prototype, presumably in an effort to capitalize on the wide acceptance of the "Ski Doo," the name under which Bombardier's snowmobiles are sold.

of appeals, without commenting on this bizarre finding,[5] concluded that respondent had suffered *antitrust* injury for altogether different reasons: (a) that Bombardier's market power in snowmobiles and its plan to bring out its own small motorcycle had helped induce Agrati to break its contract with respondent, and (b) that after Bombardier became the distributor of Agrati's small motorcycles, it engaged in "anticompetitive behavior" aimed at eliminating respondent from the market, which injured competition.[6] (605 F.2d at 13-14; App. A24-A28)

The court of appeals did not attempt to relate these facts to the division-of-markets theory of antitrust liability which formed the basis for its decision.

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[5] Respondent did not claim that after it lost the Agrati line it was a potential purchaser from Agrati and Bombardier and therefore would have benefitted from competition between them, even though the trial judge specifically asked whether it was making such a claim.

[6] A summary of this "anticompetitive behavior" is as follows:

(a) Bombardier used "deceptive means"—a market researcher pretended he was interested in becoming a dealer of respondent's—to ascertain respondent's suggested retail prices.

(b) Bombardier suggested retail prices in the spring of 1971 at lower levels than respondent had suggested the prior year when it marketed the Agrati motorcycles.

(c) A Bombardier employee told a dealer of respondent's at a trade show that Bombardier was displaying the Agrati motorcycle because it had replaced respondent as Agrati's exclusive distributor.

(d) Bombardier issued press releases in January 1971 stating that it had become Agrati's exclusive distributor.

(605 F.2d at 14; App. A26)

The evidence of "anticompetitive behavior" was offered by respondent in support of the antitrust theory on which the court of appeals did not pass. According to the trial judge, a plaintiff may recover under this theory if it shows (i) a conspiracy to destroy it by "unfair means" and (ii) a consequent effect on competition. The jury found for respondent under this theory, finding that injury to competition occurred when Bombardier replaced respondent as distributor of Agrati's product.



## REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals erroneously creates a new and anticompetitive *per se* rule under Section 1 of the Sherman Act by effectively prohibiting all joint ventures between "potential" competitors, even if the joint venture promises to increase competition and deconcentrate a heavily concentrated market. The decision squarely conflicts with numerous decisions of this Court, especially *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), and also with a recent decision in another circuit, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3514 (Feb. 15, 1980).

The Court has repeatedly held that agreements are *per se* illegal only when they are plainly anticompetitive on their face, without any need for inquiry into the facts of the market or of the agreement itself. *E.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 673 (1978); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). In *Sylvania*, the Court reversed its prior decision adopting a *per se* rule against vertical territorial restraints, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court emphasized that the rule of reason is the standard that should be applied in antitrust analysis in the absence of demonstrable economic proof that a *per se* rule is appropriate. 433 U.S. at 58-59. Such decisions are applauded by antitrust scholars who join the Court in urging that *per se* treatment, which eliminates any weighing of procompetitive and anticompetitive effects, should be reserved for naked restraints of trade which have a pernicious effect on competition and lack any redeeming virtue.[7]

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[7] *See* M. HANDLER, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979-989 (1977); A. PHILLIPS, *Schwinn Rules and the "New Economics"*

For these reasons the Court has proceeded with care in developing *per se* rules, even those most deeply embedded in the antitrust laws, and has not mechanically applied them to new situations. *See, e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). As the Court held in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972):

> "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."

Petitioners concede that a horizontal division of markets by *actual* competitors is a *per se* violation of the Sherman Act, *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), because it eliminates actual competition among existing competitors. But the Court declined to apply such a *per se* rule to a joint venture, similar to that involved here, in *United States* v. *Penn-Olin Chemical Co.*, *supra*. There, Pennsalt and Olin Mathieson entered into an agreement to build a new plant in the southeastern United States to manufacture and sell sodium chlorate. Pennsalt (like Agrati) had previously made limited sales of the product in the southeast from a plant located in another geographic market. Olin (like Bombardier), although a manufacturer of other chemical products, had never manufactured sodium chlorate but had a sales organization with experience in related products in the southeast. Both were found to possess the resources and the intent to enter the market in the southeast independently. 378 U.S. at 172. While examining the feasibility of the joint venture, Olin (like

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*of Vertical Relations*, 44 A.B.A. Antitrust L. J. 573, 579 (1975); E. POLLOCK, The *Schwinn Per Se Rule: the Case for Reconsideration*, 44 A.B.A. Antitrust L. J. 557, 562, 566-68 (1975).



Bombardier) became the exclusive distributor of Pennsalt's sodium chlorate in most of the southeast and agreed not to sell the product elsewhere, while Pennsalt (like Agrati) agreed not to sell directly in the southeast. *United States* v. *Penn-Olin Chemical Co.*, 217 F. Supp. 110, 114 (D. Del. 1963) *vacated*, 378 U.S. 158 (1964). Once the joint venture was formed, it was inevitable that this foreclosure of potential competition would continue. 378 U.S. at 169. Yet this Court rejected a *per se* market-division analysis that was urged on it and instead adopted a flexible approach, which was designed to weigh the procompetitive and anticompetitive effects of the joint venture. 378 U.S. at 176-77.

In this case, Bombardier argued that *Penn-Olin*, not the *per se* rule, provided the appropriate rule of decision and strongly urged the court of appeals to examine the procompetitive aspect of the Bombardier-Agrati agreement: an attempt to pool one company's manufacturing experience with the other's marketing resources in order to gain a toehold in a market dominated by Honda and the other large Japanese motorcycle companies. Plainly, if Bombardier and Agrati had agreed to merge, this procompetitive feature would have been weighed against any possible lessening of competition in judging the lawfulness of the merger under Section 7 of the Clayton Act. *See United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 623-25. A joint venture agreement, which involves a far less permanent relationship than a merger, should not be judged by any different standard. Indeed, where the statute being applied—Section 1 of the Sherman Act—is violated only when an actual lessening of competition is proved, there is even less justification for ignoring the procompetitive elements of the joint venture.

The court of appeals, however, refused to follow *Penn-Olin* and *Marine Bancorporation*. Instead, the court held that where an agreement involves a "territorial alloca-

tion of markets" between two "potential competitors" it is "within the ambit of per se prohibition." (605 F.2d at 11, App. at A20-A21) By applying a *per se* rule, the court of appeals conclusively presumed that the effect of the joint venture agreement is certain to be anticompetitive. The court rejected the toehold argument, concluding simply that in the absence of the agreement, there would have been two small motorcycles on the market—Agrati's and the one Bombardier proposed to make. *Id.* Yet there was no evidence whatsoever that competition was injured by Bombardier's not having brought out a new motorcycle to compete with Agrati's. The court's approach, moreover, ignores the prospect that the joint venture might have offered more vigorous competition to the dominant Japanese manufacturers than Bombardier and Agrati could have offered by acting separately.[8]

The *per se* approach of the court of appeals in this case is not consistent with precedent or with the approach of the Second Circuit in *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra.* Kodak participated in a joint development program for the production of camera flashes with Sylvania, and Sylvania agreed not to publicize new technology to other camera manufacturers until the flash devices had been perfected and until Kodak had perfected a camera to use the new device. In deciding whether this practice unduly restrained the camera market, the court applied the rule of reason analysis of *Penn-Olin* and held that whether Sylvania was a potential independent entrant into the market is *one* relevant factor, but is not dispositive, in assessing the lawfulness of the agreement.[9]

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[8] The court's approach is also based upon a factual error. When Bombardier began distributing Agrati's motorcycles, respondent itself brought out several new models. Moreover, there were dozens of other competing motorcycles sold by other companies.

[9] Even more directly on point is *Brunswick Corp.*, Dkt. No. 9028, Trade Reg. Rep. (CCH) ¶ 21,623 (F.T.C., Nov. 9, 1979). The agreement there involved the manufacture and sale of outboard motors. Brunswick was already in the U.S. market, but unlike Agrati it was the second largest seller. The other party, Yamaha, was a large recreational products company which, unlike Bombardier, had already been making and selling outboard motors. Under the agreement, Yamaha would stay out of the North American market if Brunswick would stay out of Japan. The FTC, speaking through Commissioner Pitofsky, held that the agreement should be analyzed as a joint venture under the rule of reason, and, moreover, that foreclosure of independent entry by Yamaha into the U.S. market was but one factor to be considered in determining the lawfulness of the agreement.



Moreover, the *per se* approach of the court in this case will protect concentrated markets from being penetrated by joint ventures, even if they hold out the only realistic prospect of stimulating competition and deconcentrating the market. Under the ruling below, a trial judge is not to permit an antitrust jury to weigh the procompetitive effects of such an arrangement. Instead, the jury is to be instructed that the arrangement is conclusively presumed to be unlawful.

The Court should grant this writ in order to prevent this unwarranted and potentially anticompetitive expansion of *per se* illegality under the antitrust laws.

2. The court of appeals committed a second error, and created a second conflict in the circuits, in its interpretation of Section 4 of the Clayton Act, 15 U.S.C. § 15. The court held that respondent could recover treble damages for losing its exclusive distributorship because its replacement, Bombardier, was a manufacturer who otherwise would have entered the market as a new competitor. This holding is contrary to a controlling precedent of this Court. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). Moreover, another circuit and one district court have held, contrary to the court here, that elimination of competition between manufacturers does not give rise to a treble damage action on the part of a terminated distributor. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *Kirahara* v. *Bendix Corp.*, 306 F.Supp. 72 (D. Hawaii 1969); *cf. Reibert* v. *Atlantic*

*Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (employees who are terminated as a result of illegal horizontal merger may not recover treble damages); *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 884 (D. Del. 1978) (elimination of intrabrand competition among a manufacturer's distributors does not give rise to treble damage claim on the part of a competing manufacturer).

The Court should resolve this conflict and clarify the reach of *Brunswick*.

In *Brunswick*, the Court interpreted Section 4 of the Clayton Act to require that an antitrust plaintiff show not only that it was injured by the defendant's unlawful conduct but also that it suffered "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489 (emphasis in the original). The defendant in *Brunswick* had acquired several bowling alleys that were failing. Another bowling alley operator sued for treble damages, alleging that the acquisition violated Section 7 of the Clayton Act. The Court assumed the Section 7 violation and that the plaintiff's injury was traceable to the defendant's acquisitions. Yet the Court held that treble damages were not recoverable because the plaintiff's injury did not result from the aspects of the defendant's actions that made the acquisition illegal under Section 7.

In a case closely analogous to the present case, *John Lenore & Co.* v. *Olympia Brewing Co.*, *supra*, the Ninth Circuit applied *Brunswick* and denied recovery. The plaintiff in *Lenore* was a beer distributor whose distributorship was terminated as the direct result of a merger alleged to have violated Section 7. The court of appeals, although assuming that the merger unlawfully eliminated competition between the two brewers, held that the terminated distributor could not sue because it would not have benefitted from the competition that had allegedly been eliminated.



In this case, in contrast, the First Circuit did not apply *Brunswick*. It held that respondent, because it had lost its exclusive distributorship when Agrati decided to switch to Bombardier, could recover treble damages because of the elimination of competition between Agrati and Bombardier.

The court held that *Brunswick* applies only in cases that involve Section 7 of the Clayton Act, not in Sherman Act Section 1 cases like this one. This Court's *Brunswick* decision cannot be avoided on this ground. *Brunswick* interprets Section 4 of the Clayton Act, which creates a private right of action for all violations of the antitrust laws, whether under Section 1 or Section 7. Moreover, the Section 1-Section 7 distinction is particularly inappropriate here. As shown above, the standards for judging the lawfulness of a joint venture should be essentially the same as the standards for evaluating mergers under Section 7.

There is considerable need for clarification of this issue for the benefit of lower courts. District courts in the Third and Ninth Circuits have expressly stated that *Brunswick* applies in Section 1 cases.[10] On the other hand, the Eighth Circuit has affirmed, without specific comment, a decision of a district court in that circuit that *Brunswick* is limited to Section 7 cases.[11]

The court of appeals in this case also upheld the recovery of treble damages here by ruling that, unlike

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[10] *Outboard Marine Corp.* v. *Pezetel*, *supra*; Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D. Cal. 1978), *appeal docketed*, No. 79-4266 (9th Cir. May 2, 1979).

[11] Admiral Theater Corp. v. Douglas Theatre Co., 437 F. Supp. 1268, 1295-96 (D.Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978). Two other district courts have said they need not resolve the point because the *Brunswick* standards had been met. Hauer v. Bankers Trust N.Y. Corp., 450 F. Supp. 103, 105 (E.D.Wis. 1978); Laughlin v. Wells, 446 F. Supp. 48, 50-51 n.5 (C.D. Cal. 1978).

the situation in *Brunswick*, there was "evidence of anti-competitive behavior" by Bombardier in its capacity as Agrati's distributor and a diminution of competition here by virtue of the purported division of markets. (605 F.2d at 14; App. A27) But anticompetitive activity by a joint venturer *after* it enters the market is immaterial even in assessing the lawfulness of the formation of the joint venture, let alone in determining who is entitled to recover damages if the joint venture is found to be an unlawful elimination of competition between the joint venturers. Moreover, application of the court's novel "predatory" division of markets theory to the facts of this case—in which Agrati, Bombardier and respondent were dwarfed by the dominant Japanese manufacturers —makes no sense. The court nowhere explains how respondent, struggling to recover from the loss of its Agrati distributorship by marketing new models produced by another manufacturer, would have been better off if Bombardier, in addition to marketing the Agrati products, had also brought out its own small motorcycle against which respondent would have had to compete.[12]

In short, the court of appeals in this case and the Ninth Circuit are fundamentally in conflict on whether a plaintiff in respondent's position—a distributor who was terminated after two manufacturers arguably elim-

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[12] If the court of appeals is relying upon the fact that absent the Bombardier-Agrati agreement respondent would have been marketing Agrati products, that simply means it is the loss of the Agrati distributorship, and not the purported fact that Bombardier and Agrati divided up the market, that respondent is complaining about. Even if that theory of liability had ever been advanced—and it has not been—it plainly gives rise to no antitrust liability. Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978); Craig v. Sun Oil Co., 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976); Richetti v. Meister Brau, Inc., 431 F.2d 1211 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Ace Beer Distrib., Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963).



inated competition between themselves—may recover treble damages for the loss of its distributorship. Moreover, the lower courts in general are in disarray over whether the *Brunswick* interpretation of Section 4 of the Clayton Act is even pertinent in a case in which the substantive violation is not based on Section 7 of the Clayton Act. The Court should grant this writ to resolve these important matters.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

*Of Counsel:*

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

April 1980

# Appendices

## APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
*Plaintiffs-Appellees,*

v.

BOMBARDIER LIMITED *et al.*,
*Defendants-Appellants.*

Argued March 15, 1979

Decided July 25, 1979

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John Vanderstar, Washington, D. C., with whom John D. Taurman, Covington & Burling, Paul B. Galvani, Washington, D. C., Ropes & Gray, Boston, Mass. and Paul V. Donahue, Pittsfield, Mass., were on brief for Bombardier Ltd., *et al.*

Thayer Fremont-Smith, Boston, Mass., with whom Robert S. Frank, Jr., Wm. Shaw McDermott, James A. McDaniel and Choate, Hall & Stewart, Boston, Mass., were on brief for Engine Specialties, Inc.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, PETTINE, District Judge.*

BOWNES, Circuit Judge.

On January 4, 1971, Engine Specialties, Inc. (ESI) sued Bombardier Limited (Bombardier) for tortious

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* Of the District of Rhode Island, sitting by designation.

interference with ESI's contractual relationship with Agrati-Garelli (Agrati) and for violating sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 which proscribe restraint of trade and attempted monopolization. ESI is a Pennsylvania corporation; Bombardier, a Canadian; and Agrati, an Italian corporation. An injunction, treble damages and attorney fees were sought pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On January 30, 1971, ESI moved to amend its complaint by adding an allegation of a violation of section 7 of the Clayton Act, 15 U.S.C. § 18.[1] Durham Distributors, Inc., an ESI distributor for the New England states, moved to intervene as a plaintiff in July, 1971; in the absence of any opposition, the motion was granted in August, 1971. On September 1, 1971, the district court issued a preliminary injunction against Bombardier. The court's opinion is reported at 330 F. Supp. 762. We affirmed, 454 F.2d 527. The district court granted the injunction after determining that ESI was likely to prevail on the merits of its tort claim, but specifically reserved opinion on the antitrust claims. ESI moved for a contempt citation against defendant on February 23, 1972, after Bombardier had allegedly violated the injunction which had been clarified by the district court in November, 1971, and January, 1972. Following a hearing, the court found that defendant had willfully violated the injunction and ordered damages and costs, including reasonable attorney fees to plaintiff. On September 6, 1972, the district court allowed plaintiffs' motion to join Bombardier East, Inc., defendant's wholly-owned Massachusetts subsidiary, and, on January 5, 1973, permitted Watercraft Sales Center, Inc., an ESI distributor in Michigan and parts of Indiana, to intervene as a party plaintiff. For purposes of our discussion, we will use the terms "Bombardier" to include both defendants, and "ESI" to encompass plaintiffs ESI and its two distributors, Durham Distributors, Inc. and Watercraft Sales Center, Inc.

[1] Both the Sherman § 2 and the Clayton §§ 16 and 7 claims were dropped prior to submitting the case to the jury.



On March 14, 1977, after a five week trial, the jury found for all plaintiffs against both defendants on liability, and on April 13, 1977, the same jury awarded damages to ESI of $85,000 for tortious interference with contractual relationships and $400,000 for the antitrust claims, and antitrust damages to Durham of $102,000 and Watercraft of $20,000. The antitrust damages are subject to trebling. 15 U.S.C. § 15.

## *FACTUAL BACKGROUND*

Since much of the factual background has already been reported in the opinion by the district court and by this court's affirmance, *see* 330 F.Supp. 762 and 454 F.2d 527, we sketch only those facts necessary for an understanding of the issues on appeal. The facts, and all reasonable inferences drawn therefrom, will be viewed in the light most favorable to ESI, the party prevailing in the proceedings below. *Anderson* v. *Iceland S.S. Co.*, 585 F.2d 1142, 1150 (1st Cir. 1978).

In 1967 and 1968, ESI and Agrati entered into an agreement providing that ESI would act as sole distributor for Agrati-manufactured minicycles in North America. The minicycles were made to ESI's specifications and were sold by ESI under the name "Broncco." The terms of their agreement provided that either party could terminate upon six months' notification. It further provided that if Agrati terminated the contract, it could not market, sell or supply the Broncco, either directly or indirectly, in North America for a period of two years following the contract's termination. In March, 1970, ESI and Agrati modified their agreement providing that if a default of the prior agreement occurred and continued for a period of twenty days, then the earlier agreement

would terminate without further action on either's part and that Agrati would be free of the restriction with respect to the sale of the Broncco in North America.

Bombardier, the world's largest manufacturer of snowmobiles, was interested in developing a summertime product which its extensive distributor and dealer network could market during the offseasons. Starting in 1969, it began to explore the possibility of entering the minicycle market and developed a minibike called the "Fun-Doo." However, since Bombardier was not entirely satisfied that the Fun-Doo would do well in the marketplace because of the type of transmission it had, Bombardier in 1970 corresponded with Czech, Taiwanese and Japanese manufacturers with the aim of arranging the foreign manufacture of minicycles for Bombardier. In August, 1970, Agrati met with Bombardier in Canada and discussed various proposals for the distribution and/or manufacture of minicycles. During this meeting, Bombardier informed Agrati that a decision would have to be reached quickly since otherwise, Bombardier would consider manufacturing a product of its own. On September 13, 1970, Bombardier met in Italy with Agrati and discussed the problems posed by Agrati's contract with ESI, which made ESI Agrati's sole distributor in North America and which forbade the sale by Agrati of the Broncco for a period of two years in the event that Agrati terminated the contract. On September 16, a meeting with representatives from ESI, Bombardier, and Agrati took place at Agrati's plant in Milan. Bombardier's interest in displacing ESI was made known and suggestions were proposed to ESI that in exchange for relinquishing its exclusive dealership it could be made a dealer for Bombardier and that Bombardier might invest in ESI. Agrati emphasized to ESI that Bombardier would come into the market independently if an agreement could not be arranged and that, because of Bombardier's size,



it would overwhelm the competition. ESI maintained that its contract with Agrati would have to be honored and refused the proposals made by Bombardier. It was then decided between Bombardier and Agrati that Agrati would send the six month termination notice to ESI. It was also agreed between Bombardier and Agrati that, because of the six month lag, Bombardier would put its own Fun-Doo on the market that year. The remainder of Bombardier's visit with Agrati centered around plans for circumventing the two year proscription contained in ESI's contract.

During October, Bombardier became increasingly dissatisfied with the capabilities of its Fun-Doo and decided to pursue discussions with Agrati to push ahead with a joint venture between the two companies, whereby Bombardier and Agrati would form a company on a 60/40 basis, with Bombardier in control. Bombardier also inquired as to whether Agrati had sent the cancellation notice to ESI, which, in fact, Agrati had done.

On October 16, 1970, Agrati advised ESI that it had failed to open certain lines of credit and that this was a breach of contract. No mention was made of the twenty day provision allowing cancellation of the contract if said alleged breach remained in effect for the prescribed period. On October 19, an intervening phone call from Agrati was construed by ESI to constitute a waiver of the alleged breach.

No contract provision called for the establishment of the line of credit within the time demanded by Agrati. By letter of October 26, ESI informed Agrati that (1) it had until May, 1971, to fulfill its contract commitment to purchase 3,000 vehicles; (2) ESI had agreed with Agrati in August, 1970, to postpone the Fall shipments because of Agrati's late shipments earlier in the year; (3) Agrati's call of October 19, wherein Agrati agreed to change the shipping schedule, had superseded Agrati's

letter of October 16 which had claimed default on the part of ESI. ESI's position on these matters was made known to Bombardier by Agrati during the November meetings in Philadelphia, *see* below, and its October 26 letter discussed. Notwithstanding this, Bombardier and Agrati agreed to claim default by ESI and terminate ESI's contract.

On November 4 and 5, Agrati met with Bombardier in Philadelphia, with Agrati's American counsel. At this meeting, the 1968 and 1970 contracts with ESI were discussed (Agrati provided copies of all the agreements to Bombardier for its examination) and it was decided that Agrati would claim that ESI had breached the contract and had failed to remedy the breach for a period of twenty days, thus resulting in termination of the contract. On November 6, after a telephone call during the Philadelphia meeting to Agrati in Italy, a cable was sent by Agrati to ESI demanding that a line of credit be set up. The cable also "reminded" ESI of the contract termination which was to occur on May 20, 1971.[1a] No mention whatsoever was made of the immediate breach should ESI fail to establish the demanded lines of credit within twenty days. During the Philadelphia meetings, Bombardier proposed to Agrati that it share the costs which Agrati might incur as damages resulting from its termination of the ESI contract. This action was taken in an attempt to assuage Agrati's concern that it might be sued by ESI for breach of contract. Bombardier was encouraged by the 1970 contract, of which it had previously been unaware, providing for termination in case of a breach continuing for twenty days. Armed with the perceived ability to avoid the ESI contract free of the two year proscription, Bombardier urged Agrati to

[1a] As provided by the contract, either party could cancel with six months notice to the other. Agrati had sent notice to ESI in November, 1970. *See* discussion *supra* at 3-4.



insist on a default as soon as the twenty day period for opening the lines of credit referred to in Agrati's October 16 letter expired. On November 25, Agrati notified ESI that the contract was terminated.[2]

Bombardier travelled to Italy for meetings running from November 12 through November 18. An agreement was finalized incorporating the parties' understanding arrived at during the Philadelphia meetings. It was agreed that Agrati would deliver immediately[3] to Bombardier Broncco minicycles and parts if and when ordered. Also reduced to writing was Bombardier's agreement to compensate Agrati for damages arising from any future lawsuit for breach of contract with ESI. The two agreements were initialed by both parties on November 14. Part of the agreement was that a European holding company would be organized to actually perform Agrati's functions. Later, this conceit was dropped and Agrati was recognized as the real party to the contract.

The contract which served as the basic operating agreement between Bombardier and Agrati at first envisioned a joint venture, whereby a Canadian company would be formed to assemble and/or manufacture and/or sell certain designated motorcycles. Bombardier was to act as the sales agent for the newly formed Canadian com-

[2] ESI submitted the question of breach of contract to arbitration, as required by the contract with Agrati. In June, 1973, the arbitration tribunal ruled that Agrati had breached the contract; ESI then obtained a suspension of arbitration proceedings on the question of damages pending the outcome of the instant suit.

[3] In the first draft of the agreement, Agrati had stated that it would not provide the Broncco for a two year period after May 20, 1971, thus acknowledging the terms of the 1968 contract with ESI. Bombardier demurred, stating that its understanding from the Philadelphia meeting was that Agrati would start shipping the vehicles immediately, since Agrati was going to declare a default by ESI. The terms were changed accordingly.

pany.[4] The agreement forbade either Bombardier or Agrati from manufacturing, assembling, or acting as sales agents other than in the manner described above. In the event that either Bombardier or Agrati developed and finalized a completely new product in the motorcycle field, it would be offered in the following manner: (a) if developed by Agrati and in the range of 50cc. to 100cc., it would be offered to Bombardier for sale and manufacture in North America; (b) if developed by Bombardier and in the range over 100cc., it would be offered to Agrati for sale and manufacture through its motorcycle distribution organization, but Bombardier would have the right to sell it through its own distribution network outside North America. The contract further provided that Bombardier was to act as the exclusive agent for Agrati in the North American market. The term of the contract was for an initial period of five years.

On December 1, the Assistant to the President in charge of Bombardier's minicycle project called ESI under the guise of wanting to become an ESI distributor. During this phone conversation, Bombardier ascertained ESI's inventory, pricing and other information on the Broncco. In January, 1971, Bombardier notified its sales and advertising personnel that it was now marketing the Agrati minicycle under its own label. The notice informed them that ESI would no longer have the Broncco in its line of minicycles and stated that, whereas ESI had been pricing the Broncco at $344.95 without lights, Bombardier would market its minicycle at $339.95 with lights.

During the Spring of 1971, ESI, pursuant to its contract with Agrati, ordered spare parts for vehicles already ordered. Agrati contacted Bombardier inquiring,

[4] As events subsequently developed, the Canadian company, which was to be the joint venture link between Bombardier and Agrati, never materialized.



in light of the fact that Bombardier was now Agrati's exclusive dealer in North America, about the possibility of Agrati's making direct delivery to ESI of the requested spare parts. Bombardier responded by saying that it wanted to supply the parts to ESI and that Agrati should forbear shipping any parts. Agrati then replied, after conferring with its attorney, that the terms of the 1970 agreement with ESI provided that, even in case of breach, spare parts would have to be shipped to ESI directly by Agrati for a period of six months following breach and that, since the termination of ESI occurred on November 25, 1970, Agrati's obligation would run until May 25, 1971.[5] Bombardier thereupon agreed to Agrati's making the delivery directly.

Bombardier, during the early months of 1971, released press announcements concerning its new line of minicycles featuring the Agrati engine. During a trade show in January, 1971, Bombardier people informed an ESI dealer that Bombardier had bought part of Agrati's stock, giving it a controlling interest in the firm and that the Broncco would not be available to the ESI dealer in the near future. And in the Summer, 1971, the ESI dealer reported that the local Bombardier dealer started selling the Bombardier equivalent to the Broncco. The loss of the exclusiveness of the Broncco product made the ESI dealer decide to give up the Broncco line during the 1971 season.

[5] ESI's position was that the contract was terminated on May 1, 1971, and that it, therefore, had a right to obtain parts from Agrati for six months thereafter. For all orders after May, 1971 Agrati insisted upon ESI's establishing a line of credit, for payment at time of shipment, rather than the previously prevailing policy of payment on a 120 day accepted draft whereby ESI had 120 days following the date of shipment to make payment.

ESI's net profit before taxes was as follows:

for the fiscal year

1968 — $19,708
1969 — 35,527
1970 — 63,809*

(* $124,000 prior to extraordinary and nonrecurring expenses.)

ESI's supply line was terminated in November, 1970, two months into its 1971 fiscal year; losses for that year amounted to $261,000.[6] In 1972, ESI suffered a net loss of $816,000 and, for all practical purposes, went out of business.

## *QUESTIONS ON APPEAL*

The jury responded to special interrogatories, see Fed. R.Civ.P. 49(b), as set forth in the margin.[7]

Bombardier argues on appeal that the court erred in not entering judgment notwithstanding verdict, or in the alternative, in not ordering a new trial and specifically raises the following points. (1) It alleges that ESI's claim that the agreement between Agrati and Bombardier constituted a division of markets and, hence, a per se violation under the Sherman Act fails for two reasons, first, that the agreement was merely a joint venture and thus not susceptible to the per se proscriptions of the Sherman Act, and, second, that ESI's injury resulted

[6] This figure representing net loss to the company, included all sales of all products, not just the Broncco.

[7] The jury's answers were as follows:

1. On count I, the jury's decision on the claim that Bombardier tortiously induced the termination of ESI's exclusive distributorship of Agrati-Garelli's minicycles is for the *Plaintiff*.

2. On count I, the jury's decision on the claim that Bombardier tortiously adduced Agrati-Garelli to breach its contract with ESI is for the *Plaintiff*.

3. On count II, the jury's decision on the claim that defendants injured plaintiffs by conspiring with Agrati-Garelli not to compete is for the *Plaintiff*.

[Footnote continued on page A11]



from the substitution of Bombardier as Agrati's distributor, a wrong not redressable under the per se rule.

[7] [Continued]

4. On count II, the jury's decision on the claim that Bombardier injured ESI by conspiring with Agrati-Garelli to eliminate ESI as a competitor is for the *Plaintiff*.

5. Did Bombardier purposely induce Agrati-Garelli to *terminate its business relationship* with ESI by unfair means or by violations of the antitrust laws such as are alleged in count II?

Answer yes or no: *Yes*

6. Regarding ESI's claim that Bombardier purposely induced Agrati-Garelli to *breach its contract* with ESI, was there at the time of the alleged inducement a contract between ESI and Agrati-Garelli to which they were both bound?

Answer yes or no: *Yes*

7. If yes to the previous question, did Bombardier know of ESI's rights under the existing contract and purposely induce Agrati-Garelli to breach it?

Answer yes or no: *Yes*

8. Regarding plaintiffs' claim that Bombardier was a potential competitor of Agrati-Garelli, did Bombardier prior to November 14, 1970 have the intent and ability to market cycles like the "Fun-doo" of its own manufacture by the end of the summer of 1971?

Answer yes or no: *Yes*

9. Regarding the first of plaintiffs' two conspiracy claims, was injury to plaintiffs' business or property proximately caused by Bombardier's not entering the market with cycles like the "Fun-doo" of its own manufacture?

Answer yes or no: *Yes*

10. Regarding ESI's second conspiracy claim, did Bombardier and Agrati-Garelli conspire to drive ESI out of business and use unfair means to do so?

Answer yes or no: *Yes*

Note: Proceed to answer questions 11, 12, 13 and 14 only if the answer to question 10 is yes.

11. Did plaintiff's Broncco minicycle compete in a relatively broad submarket which included the Yamaha Mini-Enduro and Honda Trail '70?

Answer yes or no: *No*

[Footnote continued on page A12]

(2) Bombardier complains that ESI's antitrust claim that Bombardier and Agrati conspired to destroy ESI by unfair means, thereby lessening competition in a relevant market, lacked a sufficient evidentiary base for the jury to find either predatory conduct or impaired competition in a relevant market. (3) Bombardier urges that ESI's regional distributors, Durham and Watercraft, who were joined as plaintiffs, had no standing to press the antitrust complaint and that the damages for Durham lacked evidentiary support. (4) On the tort claim, Bombardier claims that the court erroneously applied Pennsylvania rather than Italian law and that, even under Pennsylvania law, the court erred in not instructing the jury that it had to find a purpose to cause harm. (5) Finally, Bombardier forwards the view that the court erred in finding a willful violation of the preliminary injunction and in awarding damages, lost profits, and attorney fees.

ESI has filed a cross-appeal in the event that we order a new trial on liability. The issues raised in the cross-appeal relate to damages and the court's limitations on the proof plaintiffs were allowed to adduce in support of its claims. ESI complains also of certain evidentiary rulings and jury instructions.

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[7] [Continued]

12. If yes to the previous question, was competition in that submarket significantly lessened as a result of the conspiracy described in question 10?

Answer yes or no: ——

13. Did plaintiff's Broncco minicycle compete in a relatively narrow submarket which did not include the Yamaha Mini-Enduro and Honda Trail '70 but rather minicycles such as Indian, Yankee Boss and Premier BB?

Answer yes or no: *Yes*

14. If yes to the previous question, was competition in that submarket significantly lessened as a result of the conspiracy described in question 10?

Answer yes or no: *Yes*



## *THE LAW*

### A. *Conspiracy to Divide Markets*

Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1. As aptly stated by Mr. Justice Brandeis, however: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). In making this inquiry, the Court, over the years has identified certain behavior which by its very nature is destructive of competition; for this, the Court has fashioned per se rules. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1950); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). For restraints of trade outside the narrow band of the inherently anticompetitive, the rule of reason applies. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 55 L.Ed. 619 (1911). *See National Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

Our task is to determine into which of these two categories the complained-of behavior falls.

At the outset, we observe that joint ventures, without more, are judged against the standard of reasonableness rather than the per se rule. *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 168-72, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964). However, the nomenclature "joint venture" does not automatically exempt a combination from the per se rule which is found to have elements inherently offensive to the antitrust laws.

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

*Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 975, 95 L.Ed. 1199 (1951). Nor is it a per se violation to unilaterally grant an exclusive distributorship to a firm, even when that entails cutting off a former distributor. *See United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled on other grounds, Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 139 (2d Cir. 1978), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1979); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 and cases there cited (9th Cir. 1969), *cert. denied* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). If Bombardier's agreement with Agrati fits within the neat contours of these restraints, the correct analysis is whether, under the rule of reason, the restraint offends the antitrust laws. ESI alleges that the agreement between Bombardier and Agrati, in fact, constituted a division of markets and was not simply a joint venture or exclusive dealer-



ship. A division of markets between competitors at the same horizontal level [8] is a per se violation. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*, 433 U.S. at 58 n. 28, 97 S.Ct. 2549; *Topco Associates, supra*, 405 U.S. at 608, 609 n. 9, 92 S.Ct. 1126; *United States* v. *Sealy, supra*, 388 U.S. at 357 n. 5, 87 S.Ct. 847.[9]

The contract on its face envisioned a joint venture (which never came to fruition) and the appointment of Bombardier as Agrati's exclusive dealer. It did, however, include certain language which ESI reads as imposing territorial restrictions on Agrati and Bombardier. If, as ESI urges, those two companies are deemed to be operating at the same level in the market place, such an agreement would be illegal per se and the fact that the alleged territorial restrictions were linked to a joint venture cannot immunize it from the reach of the antitrust laws. *Timkin* [sic] *Roller Bearing Co.* v. *United States*, *supra*, 341 U.S. at 598, 71 S.Ct. 971.

The first step in our inquiry is to ascertain whether Bombardier and Agrati can be deemed to have been operating at the same horizontal level in the market, thus triggering the per se rule should territorial restrictions be found.[10] Agreements not to compete among potential com-

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[8] Competitors operating at the same level of the market structure are considered horizontal competitors. *United States* v. *Topco Associates*, 405 U.S. 596, 608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

[9] For earlier cases holding that territorial allocations among horizontal competitors constituted per se violations of the antitrust laws see *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 574 and cases there cited (2d Cir. 1961).

[10] Bombardier on appeal attacks the application of the per se rule to the arrangement with Agrati since it claims that the per se rule has never been read to reach an arrangement between the two companies, one of which is not yet already established in the market. Bombardier failed to object to this aspect of the jury instructions. We cannot emphasize strongly enough that in the absence of plain error—and none is here found—a party should not attempt to undo an appeal what it failed to do at trial by way of jury instructions.

petitiors as well as among actual competitors are forbidden. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 378, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). *Cf. Zenith Corp.* v. *Hazeltine*, 395 U.S. 110, 125-9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). *See also United States* v. *Pan American World Airways, Inc.*, 193 F.Supp. 18, 41 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (restraint of potential competitior constitutes violation of section 2 of the Sherman Act, 15 U.S.C. § 2). It must be shown, however, that the potential competitor—Bombardier—had the necessary desire, intent, and capability to enter the market at Agrati's level, *viz.*, manufacturing.[11] There is no dispute that Bombardier was not actually *manufacturing* minicycles at the time it entered into agreement with Agrati. But Bombardier had developed a prototype, called the Fun-Doo, and had indicated to Agrati that, if an agreement could not be worked out between them, Bombardier would press ahead with a product of its own. Bombardier stipulated that in the Spring, 1971, it had truthfully boasted there was "no part of a motorcycle that we [Bombardier] cannot produce." The jury specifically found that, prior to November 14, 1970, Bombardier had the intent and ability to market cycles by the end of the summer of 1971 of its own manufacture like the Fun-Doo.[12]

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[11] Bombardier was operating at the sales level; Agrati also, through its agent ESI, was operating at the sales level in North America. The agreement between Bombardier and Agrati contained language restricting competition between the two at both the sales and manufacturing level. See *infra* at 10-11 for specific agreement terms.

[12] This determination is properly one of fact rather than law and was thus correctly submitted to the jury for its judgment. On appeal, Bombardier does not argue that the question whether Bombardier and Agrati were horizontal competitors—either actual or potential—should have been determined by the court as a matter of law rather than by the jury as a matter of fact.



Our standard of review is whether there is sufficient support in the record for this jury finding. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-7, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). If we can reach but one conclusion after reviewing the evidence and all inferences drawn fairly therefrom in the light most favorable to the plaintiff (the prevailing party) and if that conclusion differs from the jury's, only then can the finding be set aside. *Ibid.; Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 and cases there cited (1st Cir. 1978). Even if contrary evidence was presented and conflicting inferences could be drawn, it is for the jury to draw the ultimate conclusion. *Tennant* v. *Peoria & P. U. Ry Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944), and such determination will not be disturbed unless the condition described above is met.

After reviewing the evidence in this light, we conclude that there was adequate record support for the jury's finding. Perhaps as telling a piece of evidence as existed was the stipulation by Bombardier itself that in 1971 it could produce all parts necessary for a motorcycle. The president of Bombardier, Beaudoin, testified that it was the agreement made between Agrati and Bombardier in November, 1970, which caused Bombardier to decide not to manufacture a product of its own in 1971. There was evidence that Bombardier had developed, manufactured, and tested the Fun-Doo in 1970. Beaudoin testified that the Fun-Doo was designed to appeal to the same segment of the population as the ESI model. In September, 1970, Beaudoin informed Bombardier's board of directors that the Fun-Doo, developed by Bombardier, would be placed on the market that year. It was acknowledged that Bombardier was interested in developing a summertime product for its distributors and had chosen the minicycle to fulfill this purpose; there was also testimony from Bombardier's motorcycle engineer that it had the manu-

facturing capacity in terms of engine facilities and equipment plant necessary to enter the motorcycle marketplace.[13] In October, 1970, Bombardier's marketing department drew up a production and sale schedule for the Fun-Doo, which called for all phases to be completed by the end of 1970. There was also testimony that at various junctures Bombardier had intimidated Agrati with the threat of entering the market immediately with its own minicycle if an agreement could not be worked out between them. These facts, viewed together, adequately underpin the jury's finding that Bombardier had the requisite intent and ability to enter the mincycle market on its own by the end of summer, 1971.

Having concluded that there is adequate record support for the jury's finding that Agrati and Bombardier were potential competitiors at the manufacturing level, compare *United States* v. *Penn-Olin Co.*, *supra*, 378 U.S. at 175, 84 S.Ct. 1710, we now analyze the language which ESI contends illegally divided markets. If we concur that the contract language embraced territorial restricttions, the application of the per se rule would be appropriate.

The pertinent parts of the agreement[14] between Bombardier and Agrati provided:

[13] Bombardier's chief motorcycle engineer who testified on this point also stated that Bombardier had no tooling or production experience in the motorcycle line. The jury was, nonetheless, entitled to weigh this remark against the other evidence and testimony indicating that Bombardier had the requisite production capability to manufacture its own minicycle product. In fact, the engineer testified that it had been his opinion in early 1971 that, while a great deal of work needed to be done in terms of production orientation, Bombardier had the potential of entering the marketplace.

[14] The version cited in the text is that of Agrati's letter of February 23, 1971, to Bombardier clarifying two earlier versions of the contract. The original contract was initialed by the parties in November, 1970, and was subsequently modified by Bombardier's



6) * * * [N]one of the parties hereto will manufacture and/or assemble nor act as agents for the sale of motorcycles in North America, either directly or indirectly, during the term of this agreement, with the exception of the products manufactured and sold by the company "Les Industries Bouchard Ltee" or under the trade-mark "Moto-Ski".

6b) * * * [I]n the event that Bombardier or Agrati-Garelli develops and finalizes a completely new product in the motorcycle field, this product should be mutually offered in the following manner:—if they are products developed by Agrati-Garelli (in the range 50cc. to 100cc.), they should be offered to Bombardier for sale and manufacture in North America;—if they are developed by Bombardier and are in the range of over 100cc., they should be offered to Agrati-Garelli for sale and manufacture through its motorcycle distribution organization, but Bombardier will keep the right to sell them through its own distrbution organization outside North America. The offered party must advise in writing its decision to manufacture and market within one hundred and eighty (180) days, or forfeits its right in this regard.

In case the offering party is not like [*sic*] to reach an understanding with the other party on the new products quantities the latter would be prepared to sell and/or manufacture, then the former is free to distribute directly worldwide such new products.

letter of January 21, 1971, to Agrati and by Agrati's February 23, 1971, letter in response. Beaudoin, the president of Bombardier, accepted the amendments proposed by Agrati in its February 23 letter by letter dated February 23, 1971. The parties here stipulated that the written agreement of November 14, 1970, as modified by the two subsequent letters, was the basic operative document under which Bombardier and Agrati were doing business.

6c) Provisions contained in sub-paragraph b) herein above shall also apply to any motorcycles presently manufactured by Agrati-Garelli other than the mini-bike road model mini-bike motorcross, and Junior Cross types as described in Appendix B of this Agreement.

The jury specifically found that Bombardier and Agrati had conspired not to compete. We think that a fair reading of the above-quoted contract yields that finding. Paragraph 6a) is not offensive in and of itself; it purports to state merely that neither of the parties to the joint venture will compete with it by acting as agents for other parties. Paragraph 6b), however, limits the ability of both Agrati and Bombardier to compete; Agrati is foreclosed from selling or manufacturing any new motorcycle in the 50cc.-100cc. range within North America. Bombardier cannot manufacture any new product outside North America, although it retains the right to sell any product in the over-100cc. range through its own distribution network outside North America. Paragraph 6c) extends the restrictions of 6b to Agrati's existing lines, with the enumerated exceptions. In other words, Bombardier is free of Agrati's competition in both sales and manufacturing in North America and Agrati is free of Bombardier's competition in manufacturing outside North America. This, we think, rises to the level of a territorial allocation of markets.[15]

While Bombardier argues on appeal that the contract restrictions were simply incidents of a valid joint venture agreement, and thus reviewable under the rule of

[15] Present here also was behavior directed at ESI which the jury found to be unfair and anticompetitive on the part of Bombardier. *Compare United States* v. *Penn-Olin Co.*, 378 U.S. 158, 176, 84 S.Ct. 1701, 12 L.Ed.2d 775 (1964); *Oreck Corp.* v. *Whirlpool Corp.*, 563 F.2d 54, 58 (2d Cir. 1977), *aff'd on rehearing*, 579 F.2d 126 (1978), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1979).



reason rather than the per se rule, such an approach must fail for two reasons. First, joint ventures which partake of behavior identified as inherently pernicious to competition such as price fixing or territorial allocations will be judged under the per se rule rather than under the rule of reason. The talisman of "joint venture" cannot save an agreement otherwise inherently illegal. *United States* v. *Sealy, supra*, 388 U.S. at 353, 87 S.Ct. 847; *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 823 and 826-31 (7th Cir. 1978), *cert. denied* 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979). Secondly, in the context of this case, the argument that a joint venture can immunize inherently anticompetitive behavior from scrutiny under the per se rule is ineffectual since the parties agreed, in the amendments proposed by Agrati on February 23, 1971, and accepted by Bombardier, to form a joint venture only if, after study it appeared feasible to do so. That same amendment contained the restrictive language which has been cited above. In fact, the joint venture never materialized. It is clear, then, that the restrictive covenants were not mere incidents to a joint venture, but were substantive agreements in themselves, with an existence independent of the joint venture.

To sum up, the jury could properly have found that Bombardier had the requisite intent and ability to enter the market as a manufacturer of minicycles by the end of the 1971 Summer and that this, therefore, pitted Bombardier and Agrati against each other as potential competitors at the manufacturing level. The agreement entered into between the two potential competitors constituted a territorial allocation of markets such as to bring it within the ambit of per se prohibition. Our next task is to determine whether the fact of this conspiracy to divide markets caused the injury of which ESI complains.

B. *Was There Antitrust Injury?*

Bombardier contends that even were it found to be a potential competitor of Agrati and even had the two conspired to divide geographic markets, the injury sustained by plaintiff was unrelated to the alleged antitrust violation.[16] In other words, did ESI's claimed harm flow from that which makes Bombardier's activity illegal, *i.e.*, the anticompetitive effect of the scheme to divide markets. We look to *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), a case which, Bombardier argues teaches that the injury suffered by ESI is not compensable under the antitrust laws. Brunswick, the largest operator of bowling alleys, acquired several failing alleys which had defaulted in payments for equipment purchased from Brunswick, which was also one of the two largest manufacturers of bowling equipment in the United States. Competing bowling alleys brought suit alleging that Brunswick's acquisition might substantially lessen competition

[16] The analytical distinction between standing and antitrust injury is somewhat elusive. At one point, Bombardier suggested that —even presuming that it had engaged in the illegal division of markets—ESI was not the proper party to be bringing suit, *i.e.*, that it lacked "standing" to sue. The United States, it was suggested, was the proper party to sue. We think that in the case before us the distinction between standing and antitrust injury is not vital to the result, but we do view the two as conceptually distinct. As one commentator expressed it: "For example, the plaintiffs in *Brunswick*, as defendant's competitors, clearly had standing to challenge the acquisitions under the deep pocket theory; what was lacking was their inability to relate their claimed injury to the acquisitions' alleged *anticompetitive* consequences." Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum.L.Rev. 979, 997 (1977) (emphasis in original). For other discussions of this issue, *see Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *In Re Multidistrict Vehicle Air Pollution M.D.L., No. 31*, 481 F.2d 122, 125-30 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfg. Ass'n*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973).



or tend to create a monopoly in violation of section 7 of the Clayton Act, 15 U.S.C. § 18. Damages were sought pursuant to 15 U.S.C. § 15 for the reasonably expectable profits the plaintiffs would have earned had the failing alleys closed and the business which Brunswick picked up by operating them gone instead to plaintiffs. The Court held that notwithstanding the existence of the section 7 violation, which was not contested before the Supreme Court, plaintiffs could not recover since the unlawfulness of the acquisitions was due to Brunswick's status as a "deep pocket" in a field populated by "*pigmies*" and there had been no showing that plaintiffs' injuries stemmed from an abuse of Brunswick of its deep pocket. The Court observed that plaintiffs would have suffered the exact same harm had the failing alleys been purchased by "shallow pocket" companies or obtained refinancing. *Id.* at 487-90, 97 S.Ct. 690. The Court concluded,

> [F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125, 89 S. Ct. 1562.

*Id.* at 489, 97 S.Ct. at 697. (emphasis in original).

Bombardier contends that ESI's claims are like those of plaintiffs in *Brunswick, viz.*, it would have suffered the exact same injury had Agrati simply engaged in familiar switched-distributor behavior. As we noted pre-

viously, unilaterally cancelling an exclusive distributorship and substituting another company does not rise to the level of a per se violation of the antitrust acts, irrespective of the harm thereby caused to the cancelled distributor.[17] Bombardier claims that whatever evil might have flowed from the purported illegal division of markets, ESI's harm was not causally linked to it.

Before we analyze the issue of antitrust injury in further depth, we think it instructive to note several key factors distinguishing *Brunswick* from the case at bar. (1) *Brunswick* was a section 7 case, 15 U.S.C. § 18; our case entails antitrust claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, with damages sought pursuant to 15 U.S.C. § 15. Section 7 is the antimerger section and speaks in terms of preventing future injury, *viz.*, mergers are prohibited where their effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). *See Brunswick*, *supra*, 429 U.S. at 485, 97 S.Ct. 690. Both sections 1 and 2 require a showing of actual harm by plaintiff. *See generally* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1128-34 (1976). (2) Plaintiffs in *Brunswick* never proved that they had actually suffered any harm, but only that they had suffered defeat of their expectation of additional profits. Here, by contrast, plaintiffs suffered actual harm. (3) There was no proof of anticompetitive behavior by defendant Brunswick; there was such proof here. (4) In *Brunswick* there was no diminution of competition—the failing businesses were revived by the defendant and the plaintiffs continued as healthy enterprises. ESI went out of business not long after the alleged injury. We note these distinctions between *Brunswick*

[17] For a case holding that cancellations of distributor at urging of competing distributor constitutes a per se violation by the manufacturer, *see Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).



and this case in order to focus more keenly on the specific issues we face. See *Ohio-Sealy*, *supra*, 585 F.2d at 832 n.16.

To determine the merits of Bombardier's *Brunswick* argument, we first note that plaintiffs here are entitled to have all the proof they adduced at trial viewed together, with an end toward proving their complaint. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 698-9, 82 S.Ct. 1404. ESI introduced evidence that not only had Bombardier and Agrati illegally conspired to allocate markets between themselves, but, as a necessary consequence, had determined to eliminate ESI as a competitor at the same time. Because of its exclusive distributorship with Agrati, ESI stood in the way of the conspiracy's aim to allocate the sales market for minicycles to Bombardier.[18] *See Lee-Moore Oil Co.* v. *Union Oil Co. of Calif.*, 599 F.2d 1299 (4th Cir. 1979) (distributor whose contract was cancelled allegedly pursuant to conspiracy among producers has standing under section 4, 15 U.S.C. § 15, to allege *Brunswick*-type antitrust injury). Indeed, ESI was offered inducements for acceding to the conspirators wishes and only after refusing to do so was cancelled.[19] Furthermore—and as the

[18] Although there is no allegation that Bombardier was a monopolist in the snowmobile business, it sold over 50% of the snowmobiles sold in the United States and had sales from all products of more than $160,000,000 plus an extensive dealer network in the United States and Canada. There is no gainsaying that Bombardier possessed the economic muscle to overwhelm ESI, whose sales in 1970 amounted to $727,320, and to induce Agrati to cooperate with it. *Compare George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 559 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975).

[19] At trial, ESI pressed a claim premised on *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), that the concerted action taken by the conspirators Agrati and Bombardier to induce ESI to comply with the plan to divide territorial markets constituted a violation. *See id.* at 45-47, 80 S.Ct. 503. ESI argued that the affirmative action taken in cancelling it following ESI's refusal to go along with the illegal plan constituted

jury specifically found—Bombardier induced Agrati to terminate its contract with ESI by unfair or illegal means. ESI introduced evidence of Bombardier's threats to enter the market independently against the Agrati line unless Agrati agreed to do business with it. Bombardier urged Agrati to cut ESI off precipitously with no advance notice, thus depriving ESI of the opportunity to search for an alternate source of supply prior to termination. Bombardier then later attempted to dissuade Agrati from supplying parts to ESI which were contractually called for, even in case of cancellation. There was proof that Bombardier deliberately underpriced its Agrati cycle vis-a-vis the price of ESI's Broncco and that Bombardier used deceptive means for obtaining inventory, pricing and other information from ESI. In essence, as part of the territorial scheme, Bombardier worked to eliminate ESI as a viable competitive force in the minicycle market.[20] Bombardier had indicated to ESI distributors that they would no longer have exclusive rights to the Broncco and that Bombardier itself would soon be marketing the Agrati-made cycles. Bombardier released press statements that it would now be carrying the Agrati line. Had Agrati been free to sell in North America through its former distributor ESI, Bombardier could not have claimed exclusivity on the Agrati models nor intimidated

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a violation under *Parke, Davis*. There was also the suggestion that the cancellation amounted to a concerted refusal to deal and thus illegal under *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). As neither of these theories is advanced on appeal, we need not reach the question of their applicability.

[20] While much of this evidence also is probative of the so-called "Whitten" claim, 508 F.2d 547, alleging a section 1 violation, 15 U.S.C. § 1, for intentional attempts to drive a competitor out of business by unfair methods with a concomitant impact on competition, all the evidence adduced at trial to prove antitrust violations should be viewed together as it relates to plaintiffs' claims. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).



ESI distributors with the threat of the loss of their exclusivity and their ability to obtain needed spare parts. The Court in *Brunswick* noted that plaintiffs there had failed to link their loss to the claimed antitrust violation (*i.e.*, *Brunswick's* "deep pocket"), intimating that had proof of abuse of the deep pocket been introduced, the result would have been different. 429 U.S. at 490, 97 S.Ct. 690. Here, by contrast, plaintiffs introduced evidence of anticompetitive behavior by defendants, all linked to the antitrust evil. Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, *supra*, 585 F.2d at 833 n.17; *Foremost-McKesson* v. *Instrumentation Laboratory*, 527 F.2d 417, 420 (5th Cir. 1976). There was adequate evidence to support a finding that the territorial scheme, with its corresponding unfair and anticompetitive behavior aimed at ESI, was a material factor in plaintiff's injury.[21]

Bombardier argues ingenuously that the market division actually stimulated competition by introducing a potent force into the minicycle market. This disregards the fact that had Bombardier and Agrati not so conspired, there would have been *two* minicycles for the public to choose from—Agrati's Broncco and Bombardier's competing model, either the Fun-Doo or some other version—rather than the *one* which the conspiracy delivered up.

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[21] Bombardier states that ESI was a mismanaged company and that the minicycle was in a state of decline and that these accounted for its demise. There may have been more than one cause of ESI's failure; plaintiffs had only to prove that defendants' behavior was a material cause of it. The jury found that defendants injured ESI by conspiring with Agrati not to compete and to eliminate ESI as a competitor. Based on a review of the pertinent evidence, we cannot say these findings lack record support. *See Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 885 (1st Cir. 1967).

This situation is thus not akin to that in *Brunswick* where competition was actually fostered by the continued presence of the once-failing businesses. Here, competition was curtailed, both as between Agrati and Bombardier and in that ESI was driven out of business and thus eliminated as a competitor.

Bombardier also contends that ESI's injuries would have been identical had Agrati merely switched distributors to a company such as Sears,[21a] an act which would not impute a per se violation of the antitrust laws. We are mindful of the danger articulated by Judge Frankel and fixed upon by defendants, namely, of converting a "garden variety" business tort into an antitrust violation. *Vogue Instrument Corp.* v. *Lem Instruments Corp.*, 40 F.R.D. 497, 499 (S.D.N.Y. 1966). *See also George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 560 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407 (1975). Our view of the etiology of this case convinces us that this is not being done here. There existed an array of misdeeds which "reflect[ed] the anticompetitive effect either of the violation or of anticompetitive acts [which were] made possible by the violation." *Brunswick, supra*, 429 U.S. at 489, 97 S.Ct. at 697. It was Bombardier's stance as an imminent potential entrant in the market which induced Agrati to succumb to Bombardier's blandishments. Had Agrati desired merely to switch the distributorship from ESI to Sears, there would have been no need to act as abruptly, cancelling the ESI contract in November, 1970, under the guise of a breach by ESI after lulling ESI into a false sense of security by having sent less than three weeks earlier a reference to the cancellation effective May, 1971. It was Agrati's desire to stave off an immediate threat of competition by Bombardier which

[21a] For purposes of this argument, it is assumed—and was argued below—that Sears lacks independent manufacturing capability.



spurred it to cancel ESI and then agree to the strategy of declaring a default in November. It was Bombardier's urgent desire to put a summertime product on the market forthwith which led to the sudden excising of ESI as Agrati's exclusive dealer. A company like Sears, lacking independent manufacturing capacity, could not have presented the same threat of competition to Agrati. Nor could it have presented the lure of foreclosing competition in the marketplace as did Bombardier.[21b] This was a quid pro quo: Agrati would surrender its current dealership with ESI in exchange for the promise of no competition from Bombardier and Bombardier would exchange its ability to enter the market against Agrati in exchange for the exclusive dealership as well as a promise of no competition from Agrati. In short, it was Bombardier's position as an imminent competitor which impelled Agrati to accede to its demands. It strains reasonable expectations to believe that the trumped up charge of default would have been used had Agrati merely wished to switch distributors. Instead, Agrati would have used the contract term calling for termination on six months notice to either party and it would not have looked to Bombardier for an agreement to indemnify it for damages arising from a breach of contract action brought by ESI. Bombardier's status as a giant in the recreational vehicle field, its extensive network of dealers and distributors, and its expressed intentions to look elsewhere for a competing product should Agrati fail to reach an agreement with it led inexorably to the division of markets. And in order to accomplish the division of markets, it

[21b] We do not understand Bombardier's argument to mean that, had Sears used the type of coercive tactics which had been employed by Bombardier, the mere fact that it lacked manufacturing capability could protect its behavior from the reach of the antitrust laws. *See Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). Our analysis above is premised on the argument that, had Agrati unilaterally switched distributors to a company like Sears, ESI would have sustained the same injury.

was necessary to deprive ESI of the Agrati product, which was done precipitously with no lead time thus depriving ESI of the opportunity to obtain its supplies from another source. The ineluctable result of the allocation of markets was that Agrati could no longer provide minicycles to ESI. *See United States* v. *Topco, supra,* 405 U.S. at 612, 92 S.Ct. 1126. We have here the type of *antitrust* injury which was found lacking in *Brunswick.*

C. *Need to Reach "Whitten" Claim—Effect on Damages Verdict*

ESI advanced two theories in support of its position that Bombardier had violated section 1 of the Sherman Act, 15 U.S.C. § 1, and caused it injury. The first was the division of markets theory, discussed above. Because we have affirmed on that issue, we do not reach the *Whitten* claim. *See George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc., supra,* 508 F.2d 547. *See* n.20, *supra.* In boiled down format, the *Whitten* theory was argued to show that Bombardier had conspired with Agrati to eliminate ESI as a competitor in the minicycle market. ESI introduced evidence, much of which has been summarized above, to show unfair methods employed by Bombardier. The essential difference in proof between the *Whitten* and the division of markets theories is that the latter is a per se violation whereas the former, given our gloss, 508 F.2d at 561-2, is generally governed by the rule of reason. *Whitten* went to the jury here under the rule of reason, after ESI had introduced evidence to establish a narrow submarket and a lessening of competition therein. *See* Jury Answers to Interrogatories Nos. 11, 13, 14, *supra,* at n.7.

Bombardier made a fleeting suggestion in its brief that, since only one damage verdict was returned for both antitrust theories, the invalidity of either requires setting aside the damage award, citing two cases in support of its position. *North American Graphite Corp.* v. *Allan,* 87 U.S.App.D.C. 154, 184 F.2d 387, 389 (1950); *Dillon* v. *Barnard,* 328 Mass. 53, 101 N.E.2d 345, 346 (1951).[22] Since we are not reaching the *Whitten* issue, we examine whether liability premised solely on the division of markets claim is sufficient to uphold the antitrust damage award.



The measure of damages under both antitrust theories is the same. *Compare North American Graphite Corp.* v. *Allan, supra,* 184 F.2d 387 (measure of damages for breach of contract claim different from *quantum meruit* claim). *See also United States* v. *Algernon Blair, Inc.,* 479 F.2d 638, 641 (4th Cir. 1973). Both theories were pleaded in one count and the same facts permissibly adduced to prove both. *Compare Mueller* v. *Hubbard Milling Co.,* 573 F.2d 1029, 1030 & 1038-9 (8th Cir. 1978), *cert. denied,* 439 U.S. 865, 99 S.Ct. 189, 58 L.Ed.2d 174 (1979) (general verdict vacated where evidence impermissibly admitted as proof of contract breach, though admissible to prove fraud and impossible to determine on what basis jury grounded its verdict). This aspect of the case presented the jury with only *one* conspiracy in violation of section 1 of the Sherman Antitrust Act. ESI was entitled to present all the proof relating to the anticompetitive behavior to the jury "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide, supra,* 370 U.S. at 699, 82 S.Ct. at 1410. Two theories were presented in support of plaintiffs' demand for relief. The court properly protected defendant against a double recovery for the same

[22] *Dillon* v. *Barnard* does not advance the cause of defendant any more than *North American Graphite Corp.* v. *Allan.* In *Dillon,* the court reversed the grant of defendant's motion for directed verdict on the grounds that the general verdict could be sustained only if shown that plaintiff was not entitled to go to the jury on either of the two counts. *North American Graphite* is distinguished in the text *infra.*

injury by instructing the jury that it was to return solely one damage verdict on the antitrust claim. No objection was taken to this element of the court's instruction: had Bombardier viewed itself as dangerously prejudiced by the failure of the court to request the jury to segregate its damages verdict for each of the theories, wo do not understand its failure to bring this to the attention of the trial judge. *Compare Mueller* v. *Hubbard Milling Co., supra,* 573 F.2d at 1030 and 1038. Plaintiffs in fact highlighted this segment of the court's instruction as needing clarification, *viz.*, explaining to the jury that it should return a separate damages verdict on both the tort claim *and* the antitrust claim, even though it might find that plaintiff sustained the same injury under both the tort and the antitrust claims. We think defendant's failure to request a segregation of the damage verdict under each of the antitrust theories was not inadvertent, but rather the result of a clear-sighted tactical decision: by informing the jury that it should allocate damages between the two theories, there existed the strong possibility that the jury—which had already found defendant liable under both theories—would cumulate the damages and return a more substantial verdict.

This is not an instance of a jury's returning a general verdict on two separate claims where the reviewing court is unable to determine whether its verdict rested on a permissible rather than an impermissible ground. *Compare Morrissey* v. *National Maritime Union of America,* 544 F.2d 19, 26-7 (2d Cir. 1976); *Albergo* v. *Reading Co.,* 372 F.2d 83, 86 (3d Cir. 1966), *cert. denied,* 386 U.S. 983, 87 S.Ct. 1284, 18 L.Ed.2d 1284 (1967); *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maatschappij,* 275 F.2d 188, 190 (2d Cir. 1960). Here, the jury responded to interrogatories, *see* Fed.R.Civ.P. 49(b), and specifically found Bombardier liable under both antitrust theories. By upholding one of the theories, we need not reach the question of whether the jury was



likewise correct in premising liability on the second. *Vareltzis* v. *Luckenbach Steamship Co.,* 258 F.2d 78, 80 (2d Cir. 1958). *Cf. Roy* v. *Star Chopper Co., Inc.,* 584 F.2d 1124, 1136 (1st Cir. 1978), *cert. denied,* 440 U.S. 916, 99 S.Ct. 1234, 59 L.Ed.2d 466 (1979) (finding of liability under strict liability obviates necessity of finding liability under warranty count.)

D. *Standing of Durham and Watercraft to Sue*

Defendant urges us to reverse the damage awards to ESI's distributors Durham and Watercraft for lack of standing to sue under section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 reads in pertinent part that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." Bombardier argues that neither Durham nor Watercraft is covered under this section.[23] The claims of Watercraft and Durham rest solely on the division of markets theory.

Watercraft and Durham were both ESI distributors of the Broncco; both rest their claims on the fact that ESI's exclusive distributorship with Agrati was terminated, resulting in their inability to obtain any further Broncco minicycles and having to compete with the Bombardier/Agrati cycle, with a consequent loss of sales. This injury does not bring them within the ambit of the protection of the antitrust laws. Watercraft and Durham were not the principal victims of the scheme to divide markets, but were innocent "bystander[s] who [were]

---

[23] The one paragraph of its brief which Bombardier devotes to the issue of whether Durham and Watercraft have standing cannot be said to have aided the court in its determination of the matter. We are also puzzled by the absence from the appendix of Bombardier's papers, filed with the district court on this issue. We assume that the motion papers and memoranda filed below contained a more detailed argument for opposing standing than the meager one advanced before us.

hit but not aimed at[.]" *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969), quoting *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). Recovery of treble damages is potent ammunition intended not only to protect the aggrieved, but to deter the wrongdoer. The courts have attempted to keep the range of the barrage within the target area thought to have been intended by Congress in passing the antitrust legislation. *See e.g., Hawaii* v. *Standard Oil of Calif. Co.*, 405 U.S. 251 and cases cited at 262-3 n.14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168-9 (7th Cir. 1978), *cert. denied*, 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-9 (1977); *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F.2d 30, 34-5 (5th Cir. 1977); *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-31 and cases cited at nn.7, 8 and 9 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfg. Ass'n*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1293-7 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972). A principal concern has been to avoid duplicative recoveries. In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Court rejected the pleas of indirect purchasers that they be permitted to sue manufacturers for overpricing materials sold to them via the direct purchasers. The Court discussed the need to avoid "unwarranted multiple liability," *id.* at 730, 97 S.Ct. 2061, by limiting the right to bring suit to the direct purchasers.[24] Though *Illinois Brick* is not directly

[24] In *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), while confirming that consumers who pay higher prices as a result of illegal price fixing have sustained an injury to their "property" as that term is used in 15 U.S.C. § 15



applicable here since it involved a narrow question concerning the offensive use of the "pass-on" rule, it does articulate the caution to be employed in assessing claims of parties who are removed from the alleged anticompetitive acts.

The conspiracy between Bombardier and Agrati to divide markets was not aimed at the market level at which Durham and Watercraft were operating. It was the particular configuration of facts whereby elimination of ESI as Agrati's distributor was necessary to effectuate the territorial scheme which brought ESI so clearly within *Brunswick*. Watercraft and Durham argue their harms in terms of the loss of sales—due either to the loss of the Broncco or the loss of its exclusivity—because ESI was cut off by Agrati. Watercraft and Durham belong to that class "who have suffered economic damage by virtue of their relationship with 'targets' . . . rather than by being 'targets' themselves." *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc., supra*, 454 F.2d at 1295. The antitrust injury was suffered by ESI alone, although the economic injury was suffered by all three plaintiffs. The conspiracy to divide markets was not directed at Durham and Watercraft's level, *i.e.*, distribution. The anticompetitive acts taken against ESI were directed solely at ESI as part of the scheme to divide territories and not at either of its two distributors. Although the natural result of depriving ESI of the Agrati product was to likewise deprive ESI's distributors

the Court specifically reserved opinion as to whether the direct-purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), would bar recovery. In explaining the holding of *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the Court stated that the "central premise" of that case was the Court's concern over "duplicative recoveries." *Reiter*, —— U.S. at ——, 99 S.Ct. 2326.

of it, we think that the distributors lie outside the target area section 4 encompasses. *Ibid.*[25]

We therefore conclude that neither Watercraft nor Durham had standing under section 4 of the Clayton Act, 15 U.S.C. § 15.

E. *The Tort Claim*

Bombardier contends that judgment should be entered in its favor on ESI's claim of tortious interference with a contractual relationship and tortious inducement to

[25] ESI cites several cases to bolster its view that Watercraft and Durham have standing under § 4. *Hoopes* v. *Union Oil Co. of Calif.*, 374 F.2d 480 (9th Cir. 1967); *Sanitary Milk Producers* v. *Bergians Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934, 87 S.Ct. 295, 17 L.Ed.2d 215 (1966); *Harman* v. *Valley National Bank of Arizona*, 339 F.2d 565 (9th Cir. 1964); *Twentieth Century-Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964). Those cases do not advance the argument. Factually, all are different; substantively, three of the cases, *Hoopes*, *South Carolina Council of Milk Producers, Inc.*, and *Harman*, involved reversals of dismissals or summary judgments against plaintiffs, with the courts' commenting that a triable issue was presented on the pleadings. The Supreme Court has cautioned against summary procedures in antitrust litigation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). The other cases relied on by ESI are clearly not apposite, since the anticompetitive acts were either specifically directed at the plaintiff or entailed injury within the market level at which plaintiff was operating. *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1969), adds no weight to ESI's position: Perkins *directly* suffered price discrimination in its purchases from defendant Standard and the Court aptly said that Standard could not protect itself from a Robinson-Patman violation by adding one layer to the distribution system. *Perkins* in no way lessens the requirement for standing under § 4 of the Clayton Act, *i.e.*, one must be within the "target area" to receive protection. Here, by contrast with the cited cases, the anticompetitive acts were not levelled against Watercraft and Durham, but rather against ESI. The market area affected by the conspiracy to divide markets at the manufacturing level does not impact the distributing level except, remotely, indirectly and incidentally.



breach contract on two grounds: first that the court below erroneously applied the law of Pennsylvania rather than Italy, and, second, that even under Pennsylvania law, ESI failed to present a jury claim.

1. *The Conflicts Question*

Massachusetts conflicts law governs which law should apply to the tort claim. *Klaxton* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Roy* v. *Star Chopper Co., Inc.*, *supra*, 584 F.2d at 1128. Massachusetts has historically adhered to the lex loci deliciti conflicts rule for torts. *Brogie* v. *Vogel*, 348 Mass. 619, 205 N.E.2d 234 (1965). Recently, the Massachusetts Supreme Judicial Court, while maintaining its adherence to this rule for "the vast majority of issues in multistate torts suits[,]" *Pevoski* v. *Pevoski*, 371 Mass. 358, 358 N.E.2d 416, 417 (1976), indicated that where the question revolved around standards of conduct, it would look to the law of the jurisdiction having the strongest interest in resolving the particular issue presented. *Ibid.* This test is found in the Restatement (Second) of Conflict of Laws §§ 145, 146 (1971). *See also Tessier* v. *State Farm Mutual Ins. Co.*, 334 F.Supp. 807, 808 (D. Mass. 1971), *aff'd*, 458 F.2d 1299 (1st Cir. 1972). Applying either test, we find no error in the district court's application of Pennsylvania rather than Italian law.[26] The place of injury is where plaintiff suffered the harm, i.e., at its place of business, Pennsylvania.

[26] ESI contends that, in fact, no different result would obtain irrespective of whether Italian or Pennsylvania law is applied. This has been termed the "false conflicts" theory by Prof. Brainerd Currie. Comment, *False Conflicts*, 55 Calif.L.Rev. 74 (1967). *See In Re Air Crash Disaster At Boston, Mass.*, July 31, 1973, 399 F.Supp. 1106, 1115 n.13 (D.Mass. 1975). This theory is invoked when (1) there is no true conflict of laws because only one state is interested in the application of its law or (2) the laws of the two states are found to be compatible. It is the latter prong on which ESI forwards its argument.

The forum with the most significant contacts is similarly Pennsylvania: (a) It is the place where the injury occurred. (b) It was at the November, 1970, meeting in Philadelphia that Bombardier and Agrati initialed their agreement not to compete and appointed Bombardier Agrati's new exclusive dealer. The formal signing in Italy later was admitted by Bombardier's president to be a mere confirmation of the Philadelphia accord, so that it was there the conduct occurred which caused ESI's injury. (c) ESI is a Pennsylvania corporation and Bombardier a Canadian one; as between Pennsylvania and Italy, Pennsylvania should be favored since at least one of the parties is incorporated there. *See* Restatement (Second) of Conflict of Laws § 145.

2. *Pennsylvania Law on Tortious Interference*

Bombardier alleges that Pennsylvania requires a showing of intent to cause harm in suits claiming tortious interference with contractual relations, citing *Birl* v. *Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960), and *Glenn* v. *Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971). Neither case stands for the proposition that a specific intent to cause harm is essential to a case of tortious interference. *Birl* restates the common law rule that an intentional, unprivileged interference with a contractual relationship given rise to a tort action. The court there relied on the Restatement of Torts § 766 which articulates the rule. The *Birl* court makes it clear that intent to cause harm in the sense that defendant must evince "malice" toward plaintiff is not required, merely that defendant must act with the purpose of causing the specific harm cited, *viz.*, interfering with the known contract. *Id.* at 474. *Glenn* v. *Point Park College*, *supra*, extends liability to interference with prospective contractual relations as well. The Pennsylvania court quotes the Restatement (Second) of Torts § 766A, Comment d (Tent. Draft No. 14), to wit, that defendant must intend the interference and have acted at least in part to



effectuate the interference. 272 A.2d at 899. *See also Adler, Barish, Daniels, Levin, etc.* v. *Epstein*, 393 A.2d 1175, 1181-4 (Pa. 1978). There is no warrant for finding either that the court below improperly instructed the jury on the intent necessary to sustain liability under the tort or that there was an absence of probative evidence from which the jury could have found that Bombardier knowingly, intentionally, and improperly interfered with ESI's contractual relationship and induced Agrati to cancel its contractual relationship with ESI.

F. *Lost Profits and Attorney Fees for Willful Contempt*

The district court enjoined Bombardier from selling Agrati minicycles in September, 1971. We affirmed. 454 F.2d 527. After requests by Bombardier for clarification, the district court made clear that the injunction extended to spare parts for the cycles. Notwithstanding the fact that the court twice indicated that the injunction covered spare parts, both Bombardier and its subsidiaries continued to sell them, up until and after the time a motion for contempt was filed in February, 1972, by ESI. On July 27, 1972, the district court found Bombardier to have willfully violated the preliminary injunction and found it in civil contempt. The court accordingly ordered damages, to be based on all sales of spare parts made or supplied by Agrati to Bombardier from September 13, 1971, through July 27, 1972. Damages were computed at the list price for which ESI would have sold the parts. The court allowed plaintiff to recover all attorney fees incurred in prosecuting of the contempt proceeding. Bombardier here argues that the court erred in permitting full damages and in permitting ESI to recover attorney fees for its counsel's standard hourly billing rates multiplied by the hours actually spent on the contempt matter. Bombardier puts itself in a vulnerable position by arguing either point. As the court below found, Bombardier's actions with respect to the preliminary injunc-

tion were willfully contemptuous. We find nothing to suggest that the court's method of computing damages was improper. As far as attorney fees go, Bombardier stymied ESI at every juncture during the proceedings—which lasted for two and one-half years following the July 1972, finding by the court of willful contempt—for a determination of costs and damages. ESI was forced twice to seek a motion to compel, see Fed.R.Civ.P. 37, and engaged in extensive and contested discovery to ascertain the true amount of damages. The predictable result of such behavior is that ESI's attorney fees were much higher than they would have been had the necessary information been disgorged earlier and easier. We do not find that the district court abused its discretion in allowing recovery of full attorney fees in prosecuting the contempt.[27]

*The judgment is reversed with respect to Durham and Watercraft with an order that judgment n.o.v. be entered for defendants as to those plaintiffs. In all other respects, the judgment is affirmed.*

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[27] Bombardier contends that time spent on theories which the district court rejected in finding contempt should not have been chargeable against Bombardier. The amounts in question approximate $1,150. A total of $20,115.14 in fees and costs was allowed by the court. We find no abuse of discretion in the court's refusing to excise relatively minor amounts of time spent by plaintiff's counsel on theories which the court ultimately rejected. Bombardier ran the risk of incurring attorney fees by its contumacious behavior. That the plaintiff was unable to successfully predict which theories the court would accept and which it would reject requires a nicety we are not willing to impose. "Certainly it was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights . . . ." *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 428, 43 S.Ct. 458, 466, 67 L.Ed. 719 (1923).



## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
*Plaintiffs, Appellees,*

v.

BOMBARDIER LIMITED, *et al.*,
*Defendants, Appellants.*

## CORRECTED JUDGMENT

Entered July 26, 1979

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nunc pro tunc July 25, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed with respect to Durham and Watercraft with an order that judgment n.o.v. be entered for defendants as to those plaintiffs. In all other respects, the judgment is affirmed.

Appellees are to receive 80% of their costs in this appeal.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Vanderstar and Fremont-Smith.]

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
*Plaintiffs, Appellees,*

v.

BOMBARDIER LIMITED, *et al.*,
*Defendants, Appellants.*

## JUDGMENT

Entered February 21, 1980

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This cause came on to be submitted upon supplemental memoranda and briefs.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: After consideration of the petition for rehearing and the briefs filed in connection therewith, it is ordered that the corrected judgment entered July 26, 1979, nunc pro tunc, remains in effect.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Vanderstar and Fremont-Smith.]

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

No. 78-1492

ENGINE SPECIALTIES, INC., *et al.*,
*Plaintiffs, Appellees,*

v.

BOMBARDIER LIMITED, *et al.*,
*Defendants, Appellants.*

### ORDER OF COURT

Entered March 3, 1980

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Upon motion of appellants and response thereto,

It is ordered that mandate be, and the same hereby is, stayed pending the filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, the same to be filed by April 14, 1980 and notice of such filing to be filed promptly with the Clerk of this Court.

By the Court:

/s/ Dana H. Gallup
Clerk

[Cert. c. Clerk, U.S.D.C., Mass.; cc:
Messrs. Vanderstar and Fremont-Smith.]

FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1600

BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
PETITIONERS,

*v.*

ENGINE SPECIALTIES, INC.,
RESPONDENT.

## BRIEF OF RESPONDENT, ENGINE SPECIALTIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THAYER FREMONT-SMITH
ROBERT S. FRANK, JR.
JAMES A. MCDANIEL
CHOATE, HALL & STEWART
60 State Street
Boston, MA 02109
(617) 227-5020

Blanchard Press, Inc., Boston, Mass. — Law Printers

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1600

BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
PETITIONERS,

*v.*

ENGINE SPECIALTIES, INC.,
RESPONDENT.

## BRIEF OF RESPONDENT, ENGINE SPECIALTIES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Jurisdiction

On July 26, 1979, the Court of Appeals entered judgment in this case *nunc pro tunc* July 25, 1979, affirming the judgments below for plaintiff Engine Specialties, Inc. ("ESI") against defendants Bombardier Limited and Bombardier East, Inc. None of those parties filed a Petition for Rehearing.

On August 3, 1979, a Petition for Rehearing was filed by Durham Distributors, Inc. ("Durham") and Watercraft Sales Center, Inc. ("Watercraft"). Durham and Watercraft were two sub-distributors of ESI. They had obtained judgments in the trial court, but those judgments were reversed by the

Court of Appeals on the ground that Durham and Watercraft lacked standing. Their petitions for rehearing addressed the question of those co-plaintiffs' standing only. On September 21, 1979, the Court of Appeals granted a rehearing, but expressly limited the rehearing to "the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory" (See Order dated September 21, 1979, attached hereto as Appendix I). On February 4, 1980, the Court of Appeals entered a "judgment" reaffirming its prior ruling on standing and ordering "that the corrected judgment entered July 26, 1979, *nunc pro tunc*, remains in effect". Not until April 14, 1980 (almost nine months after judgment was entered for ESI against Bombardier and Bombardier East), did Petitioners file the instant Petition seeking review of the judgment in ESI's favor.

A petition for a writ of certiorari must be filed within ninety days from the date of entry of the judgment which the Supreme Court is requested to review. Rule 34. A petition for rehearing or motion to amend a judgment will toll the running of the ninety day period only where the issue addressed in the petition is "inextricably linked" to the issues involved in the judgment which is the subject of the petition for certiorari. See *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966).

This Court has refused to consider petitions for certiorari filed more than ninety days after the judgment by the Court of Appeals where (as here) a subsequent judgment "had no effect on the merits of the decision that... [the Supreme Court is] now asked to review in the petition for certiorari". *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Since the petition for rehearing addressed only the issue of Durham's and Watercraft's standing, and the allowance of the petition by the Court of Appeals was also expressly limited to that single issue, the petition for rehearing had no bearing whatsoever on the issue that this Court is now asked to review



— defendants' liability to ESI. That question was decided by the Court of Appeals on July 26, 1979. The filing of an unrelated petition for rehearing did not toll the ninety day period for filing a petition for certiorari. Therefore, the instant petition was not filed within the time set forth in Rule 34, and this Court has no jurisdiction to entertain it.

## Questions Presented

1. Was this Petition timely filed?
2. Should a defendant who failed to object to instructions, and, indeed, who specifically assented thereto, be permitted to assign those jury instructions as error on appeal?
3. Was it illegal *per se* under the Sherman Act for Bombardier, which was about to enter the North American market with its own minicycles, to agree not to compete and to divide markets with Agrati-Garelli ("Agrati"), a manufacturer of minicycles which was then active in the North American market?
4. Was the agreement not to compete between Agrati and Bombardier any less illegal because one version of that agreement also provided for the creation of a joint venture, which never materialized, between the parties?
5. Where the plaintiff was terminated as Agrati's distributor in order to effectuate the agreement not to compete, and because it refused to participate in that agreement, and where ESI was also the target of acts designed to drive it out of business, was ESI injured by that which made the defendants' conduct illegal under the antitrust laws?
6. Where Bombardier and Agrati, as part of their agreement not to compete with one another, conspired to, and did, drive ESI out of business by the use of unfair means and predatory conduct, and where Bombardier thereby captured a significant share of a relevant market, did ESI have an independent cause of action under the antitrust laws?

## Counterstatement Of The Case

The Court of Appeals carefully and accurately stated the facts of this case. (A3-10). These facts, in summary, are as follows:

In 1970, defendant Bombardier, "the world's largest manufacturer of snowmobiles" (A4, App. 89, 5378-5403)[1] and "a giant in the recreational vehicle field" (A29), had developed and successfully tested a small motorcycle product called a minicycle. (A4, App. 10, 1936-7, 4735-4743). It needed a summer product to sell to its snowmobile distributors and dealers. It planned to commence selling its minicycle in 1971. (A16).

At the same time, Agrati, an Italian company, manufactured a minicycle, which was distributed in North America on an exclusive basis by ESI. (A4).

Bombardier and Agrati each feared competition by the other. Between August and November 1970, a series of meetings were held and communications exchanged between Bombardier and Agrati which are described by the Court of Appeals. (A4-10). In August 1970, Bombardier and Agrati met in Canada. Agrati was immediately impressed by Bombardier's manufacturing capability and its vast distributing network. Bombardier was impressed by Agrati's minicycle product. Bombardier apprised Agrati of its intention to enter the market in competition with Agrati, but "expressed an interest" in the Agrati minicycle. Proposals for the joint manufacture or marketing of minicycles were discussed. Agrati informed Bombardier of its exclusive distributorship contract with ESI. Bombardier was undaunted. It informed Agrati that Agrati would have to make a decision with respect to the proposals under discussion "very quickly" because Bombardier was "considering manufacturing its own product". (App. 3103-6, 3216-3220, 3230; See A6).

[1] Citations to the Record Appendix in the Court of Appeals will appear with the prefix "App.". The Court of Appeals decision is attached to the Petition as Appendix A and is referred to herein as "A".



The threat of competition was not lost on Agrati. Its president later warned ESI's president:

> "That he had been to Canada, he had visited their plant; they were very big; they were very formidable; they were very thorough in that they had Broncco bikes, [the Agrati manufactured minicycles then being sold by ESI] up there which they had dissected and made a study of; and I would be well-advised that—to join up with them in some way and to listen to what they are saying, because they would bury me anyhow..." (App. 1341-2)[2]

In September 1970, Bombardier and Agrati met again. Detailed proposals were discussed, including an agreement not to compete and for large purchases of minicycles by Bombardier from Agrati. (App. 4753-4). The parties also discussed ways of "getting around" ESI's distributorship contract which stood in the way of Bombardier's and Agrati's plans. (App. 4754, 4766). At one point, ESI's president was summoned. On his way into the meeting with representatives of Bombardier and Agrati, he was warned by Agrati that:

> "...they, the Bombardier, was coming into the motorcycle business, anyhow, and that they were so big and powerful that we had just better listen to them or, you know, get run over by them." (App. 1334-1335; See A4-5).

ESI was then offered the opportunity to participate in an agreement not to compete with Bombardier and Agrati.

[2] The Court of Appeals observed "There is no gainsaying that Bombardier possessed the economic muscle to overwhelm ESI...and to induce Agrati to cooperate with it." (A25).

Several proposals were discussed. (App. 1337-1342). In the presence of Bombardier's officers, Agrati's president told ESI's president that:

> "Mr. Agrati, as I said, opened the meeting. — that Bombardier was coming into the motorcycle business; that they were going to be a very formidable competitor — we are going to — you know, they were just so big and powerful that it insured them success. . .—".
> (App. 1337-1342).

ESI declined to participate and insisted that its contract be honored. (App. 1344. See A25). After further consultation with Bombardier, Agrati agreed to, and did, terminate ESI's contract, effective May 1971 and Bombardier undertook to market its own minicycles in 1971. They agreed to cooperate after 1971. (App. 4756).

That, however, was not good enough for Bombardier. During October 1970, Bombardier became increasingly dissatisfied with its own minicycle. It came to believe that other minicycles in the same price range, especially the Agrati minicycle, offered "more sophisticated features" than did its minicycle. (App. 93-4, 4800). As a result, Bombardier again used the threat of competition. It pressed Agrati for a more immediate agreement not to compete, pointing out "it is essential for [Bombardier] to make an immediate move in the motorcycle field" and stating that while Bombardier preferred to join forces with Agrati, "if that is not possible, [Bombardier] would...have to look elsewhere."[3] (App. 5004; See A5).

On November 4 and 5, 1970, representatives of Agrati and Bombardier met in Philadelphia. It was decided that Agrati

[3] Of this and other similar statements, the Court of Appeals said: "Bombardier stands as a giant in the recreational vehicle field. Its extensive network of dealers and distributors and its expressed intentions to look elsewhere for a competing product should Agrati fail to reach an agreement with it led inexorably to the division of markets." (A29).



would declare that ESI had breached its contract with Agrati and was thus subject to termination if the breach continued for twenty days. (App. 2255-65). ESI was to be given no warning of Bombardier's and Agrati's intentions. (App. 2274-83; A6).

It was further decided that Agrati would sell to Bombardier immediately and Bombardier would hold its minicycle off the market. As a final inducement, Bombardier agreed to share in the payment of any damages that Agrati might be required to pay to ESI. (App. 2288-93, 3253-7, 4837).

On November 6, 1970, after a telephone call from the meeting in Philadelphia to Italy, Agrati cabled ESI demanding that ESI open a letter of credit, and reminding ESI of the May 1971 termination date. No mention was made of Bombardier's and Agrati's intention to cut off ESI in twenty days if the letter of credit were not opened. (App. 4726; A6).

Without waiting to see if the letter of credit would be opened, Bombardier and Agrati met in Italy on November 12-18, 1970. A written contract was drawn up and initialled by the presidents of Bombardier and Agrati. (A7). In the contract, which is described in detail by the Court of Appeals at A7-8, Bombardier and Agrati agreed (1) that they would not compete in the manufacture, assembly, or sale of motorcycles in North America during the term of the agreement, (2) that Agrati would sell its minicycles exclusively to Bombardier for resale in North America, (3) that a Canadian company would be formed by Bombardier and Agrati to manufacture and market minicycles in North America, and (4) that in the event that either party finalized a completely new product in the motorcycle field, that product would be offered to Bombardier or the proposed Canadian company for manufacture and sale in the North American market. Bombardier agreed to indemnify Agrati in the event of legal action by ESI — a provision upon which Agrati's lawyer insisted.[4]

[4] This agreement provided, *inter alia:*

> "...none of the parties hereto will manufacture and/or assemble nor act as agents for the sale of motorcycles in North

On November 25, 1970, as required by its written non-competition agreement with Bombardier, Agrati terminated ESI. (App. 4729, A7). It gave ESI no prior warning of its intention to terminate ESI and cut off ESI's source of supply. The jury found that this termination was a breach by Agrati of its contract with ESI. (Answer to Special Interrogatory No. 6, A11), and that Bombardier intentionally induced that breach (Answer to Special Interrogatory No. 7; A11). The Court of Appeals said that ESI was terminated on the basis of a "trumped up charge of default". (A29).

In February 1971, Bombardier and Agrati agreed to eliminate the "joint venture" feature from their agreement and to provide that the joint venture would be formed only if the parties, after study, agreed that a joint venture would be feasible (App. 4842, 4847-50). The same modification, however, re-stated the express agreement not to compete. In fact, the proposed joint venture aspect of the Bombardier/Agrati agreement never became operative. (A21).

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America, either directly or indirectly, during the terms of this agreement. . . .

. . . .in the event that Bombardier or Agrati-Garelli develops and finalizes a completely new product in the motorcycle field, this product should be mutually offered in the following manner: -if they are products developed by Agrati-Garelli (in the range 50cc to 100cc), they should be offered to Bombardier for sale and manufacture *in North America;* —if they are developed by Bombardier and are in the range of over 100cc., they should be offered to Agrati-Garelli for sale and manufacture through its motorcycle distribution organization but Bombardier will keep the right to sell them through its own distribution organization *outside North America.*" (PX 53, App. 4847-8) [emphasis supplied]

The agreement thus went far beyond the mere "joint venture" which Bombardier now claims, but expressly proscribed any competition between Bombardier and Agrati in either the sale or manufacture of any type or size of motorcycles in North America, and expressly allocated the products and the parts of the world where each would be permitted to sell.



Not content with breaching ESI's contract and cutting it off without warning, the defendants then set out to destroy ESI as a competitive force in the minicycle market by the use of what the Court of Appeals called "an array of misdeeds". (A28). To that end, defendants engaged in the following conduct:

(1) Bombardier and Agrati conspired with Agrati to cut off ESI's source of supply in November, 1970, without any warning, having misled ESI into thinking that Agrati would continue to sell to ESI until May, 1971. By this device, ESI and its distributors were deprived of their most important product and of the "lead time" necessary to develop a good substitute product.[5] (A30).

(2) Bombardier and Bombardier East used surreptitious and dishonest means[6] to gain confidential trade and technical information regarding ESI's inventory and pricing policies. (A8).

(3) Having thus obtained information respecting ESI's pricing, defendants intentionally priced the Agrati minicycles (which had been awaiting shipment to ESI[7]) at a price lower than ESI's price for its remaining inventory of the identical product (A8). The sudden appearance of these Agrati/Broncco vehicles, theretofore exclusive to ESI and its distributors and dealers, at Bombardier dealers and at very low prices, had a

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[5] ESI immediately undertook a "crash program" to develop and market a substitute product in the middle of the model year, an effort which, not surprisingly, proved unsuccessful. (App. 1517-19, 2422; A30).

[6] Defendants hired a private investigator to secretly purchase Broncco minicycles (App. 2283-8) and the assistant to defendants' president in charge of their minicycle product (Graham) obtained confidential information about ESI's pricing and inventory by misrepresenting himself to ESI's comptroller as a prospective ESI distributor (App. 5012; A8).

[7] Bombardier decals were simply pasted over the "Broncco" decals on Agrati's inventory in Italy, and the vehicles were shipped to Bombardier. (App. 2236, 4885).

devastating and demoralizing effect on ESI's distributors and dealers throughout North America. (App. 1472-1473; 1517-19; 3949-50; 3972-73; 3989).[8]

(4) For a long period of time, Agrati refused to sell any spare parts to ESI and thereafter agreed to sell parts only on onerous terms (App. 1393-8). Bombardier tried to keep Agrati from selling parts to ESI at any time or for any price (App. 4872-79; A8-9). The further demoralization of ESI's dealers which resulted from their inability to get parts was described by several witnesses. (App. 2201-2; 2976-7).[9]

(5) Defendants circulated false rumors at trade shows about ESI's demise and published press releases in a way calculated to demolish whatever remaining credibility ESI had with its distributors and dealers. (App. 3650-2; 4880-1; 3418-19; A9).

As a result of all of the above, ESI went from a growing profitable company, to a company which suffered a loss of $261,000 in 1971 and a loss of $816,000 in 1972, and which finally closed its doors in 1972.[10] (A10).

On the basis of the facts described above, the jury found

[8] See, for instance, testimony of co-plaintiff Watercraft's salesman (Westhouse) respecting reaction of Broncco dealers when the Agrati minicycles began to appear at Ski-Doo dealerships across the street. (App. 2471-2499).

[9] In September 1971, the District Court entered a preliminary injunction prohibiting Bombardier from selling Agrati minicycles or parts therefor. Bombardier continued to sell parts. On July 26, 1972, the District Court found Bombardier to be in willful contempt of court, a finding which the Court of Appeals affirmed (A39). Bombardier's conduct after the preliminary injunction exascerbated ESI's injury.

[10] By contrast, ESI's pretax profits between 1968 and 1970 were as follows:

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|---|---|
| 1968 | $19,708 |
| 1969 | $35,527 |
| 1970 | $63,809 |

($124,000 prior to extraordinary and non-recurring expenses). (A10).



that Bombardier had the intent and ability to market minicycles of its own manufacture in competition with Agrati, but that it agreed not to compete with Agrati. It found that Bombardier conspired with Agrati to eliminate ESI as a competitor and to drive ESI out of busi. ss, and that it used unfair means to do so. (Answer to Special Interrogatories Nos. 3, 4, 8 and 10; A10-11). Not surprisingly, the jury also found that ESI was injured by Bombardier's conduct. (Answer to Special Interrogatories 3, 4 and 9, A10-11).

## Summary Of Argument

This is a case which turns on the trier of fact's assessment of testimony over nine (9) weeks of trial,[11] and a careful (indeed painstaking) consideration of all legal contentions by the courts below.

Not only is the Petition not timely filed (see pp.1-3, *supra*) but the two "Questions Presented" in the Petition are not even properly before this Court. Each was expressly waived by defendants' assent to jury instructions at the trial (pp.14-16; 24-26, *infra*).

Moreover, the questions raised were rightly decided on the facts of this case, and there exists no "conflict between the circuits" or "disarray" among the lower courts with respect to either of the questions raised by Bombardier.

Finally, in view of the fact that the jury made specific findings based on abundant evidence, that defendants had engaged in predatory conduct with the specific intention of driving ESI out of business, thereby adversely affecting competition in the relatively narrow submarket in which ESI's minicycles competed, independent grounds for affirming the judgment below exist (pp.35-37, *infra*).

[11] The liability phase of the trial consumed five weeks, after which the damage phase proceeded for an additional four weeks. The Record Appendix consists of almost 6,000 pages of trial transcript and exhibits.

## Reasons For Denying The Petition

### I. The Petition Should Be Denied Because Bombardier Conceded in the Trial Court, and the Court of Appeals Correctly Ruled, That an Agreement Between Potential Competitors to Divide Markets and not to Compete is a *Per se* Violation of the Sherman Act Under *United States* v. *Topco Associates, Inc.*

The jury expressly found that Bombardier and Agrati-Garelli were potential competitors at the same level of distribution—the manufacture and sale of minicycles. Answer To Special Interrogatory No. 8. (A11). Its finding was based upon substantial evidence. That evidence included (1) the testimony of Bombardier's president that it was the agreement between Bombardier and Agrati "that caused [Bombardier] not to come into production with its own minicycle" ( App. 3203-4); (2) Bombardier's stipulation that in 1970 it "developed and manufactured a limited number of [minicycles]...and tested them with good results" (App. 90);(3) Andre Bombardier's testimony that by August, 1970, Bombardier "had almost completed the development of a minibike" (App. 2234-5); (4) Bombardier's president's memorandum to its Board of Directors which states that the initial agreement between Bombardier and Agrati, made in September 1970, was that "Bombardier will put this year on the market the minibike (Fun-Doo) developed by Bombardier" (App. 4756); (5) Bombardier's internal schedules, prepared in October 1970, which called for production to commence in November 1970 and for the "retail introduction" of Bombardier minicycles to commence by March 1, 1971 (App. 4798, 4804); (6) the cable sent to Agrati by an intermediary, in October 1970, which informed Agrati that Bombardier intended "an immediate move in the motorcycle field" (App. 5004); (7) the



statements of Agrati's officials that Bombardier was about to enter the minicycle market and would "bury" ESI in the process (App. 1341-2) and (8) Bombardier's stipulation that by early 1971, there was "no part of a motorcycle that we cannot produce". (App. 103-104). On this evidence, and far more, which the Appeals Court carefully reviewed (A16-18), the Court concluded that there was ample support for the jury's finding that by November 1970, Bombardier had the "intent and ability" to enter the minicycle market by the summer of 1971. Bombardier does not seriously contest this finding.[12]

The jury found that Bombardier and Agrati agreed to refrain from competition with one another in the manufacture and sale of minicycles in North America. That finding was based, in part, upon oral testimony, and in part upon a written agreement which expressly provided (a) "that none of the parties hereto will manufacture and/or assemble, nor act as agents for the sale of motorcycles in North America, either directly or indirectly, during the term of this agreement", (b) that Bombardier alone would manufacture and sell existing Agrati products and all new Agrati products with 50cc-100cc engines in North America and (c) that all motorcycle products developed by Bombardier with engine sizes larger than 100ccs were available to Agrati for exclusive manufacture outside North America (App. 4847-8). The Court of Appeals correctly determined that the jury had properly concluded that Bombardier and Agrati agreed not to compete, and that the written agreement "rises to the level of a territorial allocation of markets". (A18-20). Bombardier does not dispute that ruling.

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[12] In its Petition, Bombardier does suggest, in passing, that it was not about to enter the market and characterizes its minicycle a "hand-built prototype", "which witnesses for both sides disparaged as crude and unmarketable". Bombardier fails to mention that the vehicle it brought to court was only a preliminary model, and that its president admitted at trial that a (theretofore undisclosed) more advanced, "sexier version" had been developed, but not brought to court. (App. 3191-2). In any event, the question was one for the jury.

Bombardier's contention is that on the facts of this case, an agreement not to compete between these two imminent (but not yet actual) competitors was not a *per se* violation of Section 1 of the Sherman Act. It further argues that if an agreement not to compete is embodied in a contract which also calls for a joint venture between the contrating parties, it must be analyzed under the "rule of reason", even if the joint venture agreement is never effectuated. Bombardier's contentions do not present significant questions which merit consideration by this Court. Bombardier expressly waived this issue in the trial court, and nothing in the decision below conflicts with any decision of this Court or any other Court of Appeals.

A. *Bombardier Assented to the Trial Court's Ruling That An Agreement Not To Compete Between Potential Competitors Was A* Per Se *Violation Of The Anti-Trust Laws.*

This case was divided into separate trials for liability and damages. At the close of the liability phase of the trial but prior to charging the jury, the Court conducted a *voir dire* with respect to the parties' requested jury instructions. At that hearing, Bombardier's counsel conceded that the Court could properly instruct the jury that an agreement not to compete between potential competitors was a *per se* violation of the antitrust laws. The following colloquy occurred:

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| "Mr. Frank: | [Plaintiffs' Counsel] Will your Honor instruct in substance that an agreement between actual or potential competitors not to compete is a per se violation of the antitrust laws? |
| "The Court: | Yes. I want to hear from Mr. Vanderstar. That's been my assumption. |



| | |
|---|---|
| "Mr. Vanderstar: | [Bombardier's Counsel] Are we talking about division of markets or some other kind of agreement not to compete? |
| "The Court: | Division of markets. |
| "Mr. Vanderstar: | Well, if it's made specific that actual competitors, if they agreed to divide markets, violate the antitrust laws, *and potential competition* as well as potential is properly defined, I have no quarrel with that. |
| "The Court: | That's my understanding of what the law is. . . ." [emphasis supplied] (App. 3788).[13] |

Having made that concession, it is no longer open to Bombardier to contend that an agreement to divide markets between potential competitors is not a *per se* violation of the antitrust laws. The Court of Appeals held:

> "Bombardier on appeal attacks the application of the per se rule to the arrangement with Agrati since it claims that the per se rule has never been read to reach an arrangement between the two companies, one of which is not yet already established in the market. Bombardier failed to object to this aspect of the jury instructions. We cannot

[13] The Court took defendants at their word, and instructed the jury, as follows:

> "The defendant does not contest the principal of law, that is to say, that competitors and potential competitors may not divide markets without violating the antitrust laws, but the defendant's position is that it is the law but it doesn't apply here because Bombardier was not at all that ready and able to get into the market."
>
> (App. 3868)

emphasize strongly enough that in the absence of plain error—and none is here found—a party should not attempt to undo an appeal what it failed to do at trial by way of jury instructions." (A15, fn. 10).

The Court of Appeals was correct. Even if Bombardier had raised an issue which might merit further consideration by this Court (and, as demonstrated below, it did not), its waiver of that issue in the trial court resolves the issue for the purposes of this case. F.R.Civ.P., Rule 51.

B. *The Decisions Of This Court Establish That An Agreement Not To Compete Between Potential Competitors Is A* Per Se *Violation Of The Sherman Act.*

1. *The Agreement Is Illegal Because Bombardier And Agrati Were Imminent Potential Competitors.*

The record establishes that in 1970, Agrati was actively and successfully selling minicycles in North America through ESI, and that Bombardier was about to make an "immediate move" into the minicycle market, which would bring it into direct competition with Agrati.[14] Bombardier recognized the technical superiority of the Agrati product.[15] Agrati feared and coveted Bombardier's marketing strength.[16] To avoid

[14] Bombardier's president testified that its product was similar to the Agrati minicycle and was designed to appeal to the same segment of the market. (A17; App. 1937, 2113, 3219).

[15] An internal Bombardier memorandum observes that other minicycles, especially the Agrati minicycle, offered "more sophisticated features" than did the Bombardier product. (App. 4800).

[16] Agrati's statements to ESI were replete with references to the effect that Bombardier "had decided to come into the motorcycle business, that they were going to be a formidable competitor", and that "they were so powerful that it insured them success". (App. 1337-1342).



competition between themselves, Bombardier and Agrati entered an agreement to refrain from competition in North America. Their agreement was a *per se* violation of the Sherman Act.

In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a group of small supermarkets, who were not then in competition with each other, formed a cooperative association which acted as a purchasing agent for the group and distributed the purchased products under the Topco brand name to the group members. Members were assigned territories. Each had a "veto of sorts over actual or potential competition" by Topco members in its territory. 405 U.S. at 602. Most members had exclusive territories. No member could sell Topco products outside of its territory. Topco argued that it needed these restrictions to compete with larger chains. The trial court applied the "rule of reason" and found for the defendant. This Court reversed. It characterized the *Topco* agreement as an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. It held that such agreements were "naked restraints of trade", and *per se* violations of Section 1 of the Sherman Act. 405 U.S. at 608. The Court specifically declined even to consider Topco's claim (here asserted by Bombardier) that the agreement not to compete among Topco's members was justified as a means of enhancing the ability of member companies to compete with larger supermarket chains.[17]

[17] In the light of the *Topco* holding, it is unnecessary to address Bombardier's factual argument that its agreement with Agrati was designed to permit each to compete more effectively with larger motorcycle manufacturers (Honda and Yamaha). Moreover, the jury specifically found that the Agrati minicycles competed in a relatively small market which did not include Honda and Yamaha, (Answers to Special Interrogatories 11 and 13; A.11-12), in which Agrati and Bombardier were the dominant factors, and in which competition was "significantly lessened" by the Bombardier/Agrati conspiracy. (Answer to Special Interrogatory No. 14; A12). Bombardier's own "Fun-Doo" was designed to appeal to this same segment of the market. (App. 1937, 2113, 3219).

The Topco participants, moreover, were potential, not actual, competitors. There, as here, the Topco members had not competed prior to their agreement, and the agreement precluded competition after the agreement. The *Topco* decision establishes that agreements to divide territories and not to compete between such potential competitors are illegal *per se*. Any doubt as to that conclusion was removed by *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 378 (1973), where this Court said, referring to *Topco*, "We recently reemphasized the vice under the Sherman Act of territorial restrictions among *potential* competitors". [Emphasis supplied.] The Courts of Appeals and the commentators have interpreted *Topco* in the same way. *Evans* v. *S.S. Kresge Co.*, 554 F.2d 1184, 1192 (3d Cir. 1976); *cert. denied*, 433 U.S. 908 (1977); *Dougherty* v. *Continental Oil Co.*, 579 F.2d 954, 958-59 (5th Cir. 1978), *vacated by stipulation*, 591 F.2d 1206 (1979); Von Kalinowski, 11 *Antitrust Laws And Trade Regulations*, Section 78.01(2), p. 78-16 (1978) ("The *per se* rule of horizontal market allocation agreements apparently applies to the parties thereto regardless of whether they are actual or potential competitors").

It is, therefore, clear that under the decisions of this Court an agreement between competitors to avoid competition which would otherwise exist, is illegal *per se*.

2. *The Court of Appeals' Decision Is Not Inconsistent With Any Decision By This Court Or Any Court of Appeals.*

Bombardier does not address the *Topco* decision. Instead, Bombardier asserts that the Court of Appeals decision was inconsistent with this Court's decision in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), which was decided eight years before *Topco*, and that it is at odds with the Second Circuit's decision in *Berkey Photo Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *cert. denied*, 100 S.Ct. 1061



(1980). In fact, the Court of Appeals is inconsistent with neither of those decisions.

Bombardier cites *Penn-Olin* for the proposition that the creation of a joint venture is not illegal *per se* even though the formation of a joint venture tends to foreclose competition between the joint venturers. Bombardier's argument is wide of the mark. An otherwise illegal express agreement not to compete between imminent competitors is not rendered permissible by the fact that it is to be effectuated by the creation of a "joint venture". The Court of Appeals stated (A21):

> "...joint ventures which partake of behavior identified as inherently pernicious to competition such as price fixing or territorial allocations will be judged under the per se rule rather than under the rule of reason. The talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."

The Court of Appeals was clearly correct. *Topco* itself involved a joint venture. Moreover, in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), the Court declared illegal *per se* a series of agreements between related companies to divide markets and not to compete. The Court rejected the defendants contention that their division of markets was permissible because it was merely ancillary to a joint venture. It said at p. 598:

> "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'. Perhaps every agreement and combination to restrain trade could be so labeled."

In *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), this Court similarly struck down a joint venture which was used to divide markets and customers.

Moreover, *Penn-Olin* is inapplicable to this case for at least three other reasons. First, the trial court in *Penn-Olin* found that Pennsalt and Olin were not potential competitors. It found that "both Pennsalt and Olin were far removed from the point of becoming actual competitors", and that, although Olin "was studying the desirability of going into the business, no decision to do so had been made". 217 F. Supp. 110, 135-136 (D. Del. 1963), and 246 F. Supp. 917, 928, 934 (D. Del. 1965).[18] In the case at bar, the jury found that Bombardier had both the intent and the ability to enter the market within a few months (at most) of the agreement not to compete. The joint venture was conceived as a device to avoid the competition which would otherwise have existed between Bombardier and Agrati.

Second, in *Penn-Olin*, this Court noted that there was no proof of specific intent to use the joint venture as a vehicle to eliminate competition and there were no collateral restrictive agreements between the joint venturers (378 U.S. at 176); there was no agreement not to compete. Here, there was an unmistakable effort to use the joint venture to avoid competition and there was an express collateral written agreement to divide markets.

Third, Bombardier's argument fails because it is unsupported by the facts of this case. The initial (November, 1970) agreement between Bombardier and Agrati contained the agreement not to compete described above and, in addition, contemplated the creation of a jointly-owned company in Canada to manufacture motorcycles. (App. 4824). That

[18] Bombardier's Petition (p. 10) states inaccurately that this Court concluded that Pennsalt and Olin had the resources and intent to enter the relevant market. In fact, this Court said only that "the possibility of individual entry...had not been completely rejected by either Pennsalt and Olin...". 378 U.S. at 167.



agreement, however, was later modified to eliminate the "joint venture" features and to provide that the joint venture would be formed only if the parties, after study, agreed that a joint venture would be feasible. (App. 4824-39, 4840-41, 4847-48). The same modification, however, restated the express agreement not to compete. In fact, as noted by the Court of Appeals (A21), the proposed joint venture aspect of the Bombardier-Agrati agreement "never materialized". The agreement not to compete was rigorously followed at all times. It is therefore apparent, as the Court of Appeals said (A21):

> "the restrictive covenants were not mere incidents to a joint venture, but were substantive agreements in themselves, with an existence independent of the joint venture."

*Berkey Photo Inc.* v. *Eastman Kodak Company*, p. 18 *supra*, is equally inapposite. There, plaintiffs challenged two separate joint development projects between Kodak (which manufactured cameras but not flash devices) and General Electric and Sylvania (which manufactured flash devices but *not* cameras). The court declined to hold the joint development agreement between firms in "complementary" markets illegal *per se*. There was in *Berkey Photo* no finding that Kodak was an imminent potential competitor of General Electric or Sylvania. There was no written agreement to refrain from competition once the jointly developed products were available to the public. The threat of competition was not used as a device to obtain an agreement not to compete. There was only an agreement between two non-competitors to refrain from publicizing the development of their complementary, technologically innovative products (camera and flash) until those products had been perfected and introduced into the market. That is a far cry from the express agreement not to compete between imminent competitors which is present in the case at bar.[19]

[19] Bombardier suggests a conflict between the Court of Appeals' treatment of this case and a Federal Trade Commission decision

Therefore, this case was correctly decided below and the Court of Appeals decision is consistent with the decisions of this Court and those of other Courts of Appeals.

## II. The Petition Should be Denied Because the Court of Appeals Correctly Applied *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, and Because Petitioners Expressly Waived That Issue at Trial

### A. *Preliminary Statement*

Bombardier alleges that the decision below is in conflict with this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, a supplier of bowling equipment acquired certain financially weak retail bowling centers. The plaintiff, a competitor of some of the acquired bowling centers, alleged that the acquisitions violated Section 7 of the Clayton Act because they introduced a "giant" into a market of "pygmies". Plaintiff asserted that defendant had rescued firms which would otherwise have failed and that plaintiff was injured because it would otherwise have succeeded to the business of its financially weak competitors. This Court assumed that a properly instructed jury might find that

(*Brunswick Corp.*, Dkt. No. 9028, Trade Reg. Rep. (CCH) para. 21, 623 (1979)). A conflict between a court of appeals and an administrative agency is not ordinarily a ground for granting a petition for a writ of certiorari. Moreover, no conflict in fact exists. The FTC in *Brunswick* specifically cited the decision of the Court of Appeals below as establishing the proper test for the application of a *per se* analysis to a joint venture. *Id.* at p. 21,781 n. 23. The FTC declined to apply the *per se* rule only after finding, *inter alia*, that a joint venture was actually established which successfully produced a new product. Compare the FTC's decision in *SKF Industries, Inc.*, Dkt. No. 9046, FCC Complaints and Orders (CCH) para. 21,508 (1978), where (as here) an agreement not to compete, in which one firm withdrew from the manufacturing level in return for the exclusive distribution rights to the other firm's product, was held illegal *per se* under Section 1 of the Sherman Act.



the Clayton Act had been violated. It stated that the issue for decision was the "narrow" question:

> "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares."
>
> —429 U.S. at 484.

The Court noted that defendant's conduct was illegal, if at all, not because defendant acquired retail bowling centers and not because it revived a moribund competitor, but rather because it introduced a "deep pocket" into a market of small competitors. However, plaintiff's alleged injury was unrelated to the introduction of a deep pocket into the market. It sprung instead merely from the *preservation* of competition. 429 U.S. at 487-488. Not surprisingly, the Court observed that "It is inimical to the purposes of [the antitrust] laws to award damages for the type of injury claimed here." 429 U.S. at 488. There was nothing "anticompetitive" about preserving competition. The Court held (at p. 489):

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by violation. It should, in short, be 'the type of loss that the claimed violations...would be likely to cause'. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. at 125."

The Court noted that the plaintiff had made no substantial effort to prove that the defendant "abused its deep pocket" or that plaintiff had been injured by "such predation". 429 U.S. at 490.

Nothing in *Brunswick* suggests that this case was wrongly decided or is appropriate for review by this Court. On the contrary, for the reasons stated below, the trial judge and the Court of Appeals each concluded that the jury was warranted in finding that ESI's injury flowed from that which made Bombardier's conduct unlawful. Moreover, Bombardier conceded at trial that the jury could so find.

B. *Bombardier Waived Its* Brunswick *Argument In The Trial Court*

At trial, ESI contended, *inter alia*, that Bombardier used its status as an imminent potential competitor in the minicycle market, and the threat that it would enter the market with its own independent product in a manner which would "bury" ESI and Agrati, to persuade Agrati to enter into the agreement not to compete. The very thing which made the Bombardier-Agrati contract illegal — the desire to avoid competition between two independently manufactured products — was the thing which resulted in Agrati's refusal to sell to ESI. Moreover, since ESI's contract forbade sales by Agrati to Bombardier (because ESI was the instrument by which Agrati products would otherwise have been sold in competition with Bombardier products) and since ESI would not cooperate in the Bombardier/Agrati scheme, ESI had to be cut off in order to achieve the conspirators' anticompetitive purpose (the avoidance of competition between the Bombardier minicycle and the Agrati minicycle). Indeed, the very provision in the Bombardier/Agrati agreement which precluded competition between Bombardier and Agrati, required Agrati to terminate ESI. (App. 4824). As a result, ESI's injury literally flowed from that which made the conspirators' acts illegal. Bombardier now argues that the above does not constitute antitrust injury within the purview of *Brunswick*.



However, Bombardier expressly waived this contention at the trial. During the argument on defendants' motions for a directed verdict, plaintiffs' counsel stated, *inter alia*, that plaintiff suffered "antitrust injury" for the reasons described above. Bombardier's counsel acknowledged that such conduct, if proven, would satisfy the requirement set forth in *Brunswick*. The following colloquy appears at App. 3736-3737:

| | |
|---|---|
| "Mr. Vanderstar: | [Bombardier's counsel]...I don't think there is any evidence that Agrati was sitting there contentedly doing business with ESI and then this giant from Canada came in and said: We're coming into the marketplace and will drive your product out of the marketplace unless you agree with us. |
| "The Court: | That is precisely the plaintiff's point. |
| "Mr. Vanderstar: | There is no evidence to support it, your Honor. |
| | * * * * |
| "The Court: | That is what he says is the whole case. |
| "Mr. Vanderstar: | If the case is served up to the jury on that basis— |
| "The Court: | All right. |
| "Mr. Vanderstar: | —obviously, we will ask the jury to find in our favor. |
| "Mr. Fremont-Smith: | Oh, sure. |
| "The Court: | I think that is how it is being served up. |
| "Mr. Vanderstar: | All right. *That is fine, as long as it is made clear to the jury but that is* |

> *what they have to find in order to find an anti-trust violation; they have to find that it was Bombardier's threat to Agrati and Agrati's fear of the entry of Bombardier into the marketplace that caused Agrati to terminate ESI; and, if that is the way the case is put to the jury, I am perfectly content, your Honor."* [Emphasis Supplied]

The parties each argued this issue to the jury. (App. 3790-91, 3794-3799). The Court gave the charge to which Bombardier had consented. (App. 3867-3873). Bombardier did not object to that charge. (App. 3909-3914). The jury found for the plaintiff.

It is now too late for Bombardier to complain. "No party may assign as error the giving [of]...an instruction unless he objects thereto before the jury retires to consider its verdict." F.R.Civ.P., Rule 51.

It is, therefore, clear both that plaintiffs were injured by that which made defendants' conduct illegal and that the defendants are precluded from arguing otherwise.

C. *The Appeals Court Correctly Applied* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. *to the Facts of This Case. Its Decision Is Not Inconsistent With the Decisions of Other Courts.*

The Petition attempts to manufacture a non-existent conflict between the Circuits by a flat mischaracterization of the Court of Appeals' decision. Bombardier contends that the Appeals Court failed to "apply *Brunswick*" and held that *Brunswick* "applies only in cases that involve Section 7 of the Clayton Act, not in Sherman Act Section 1 cases like this one."



(Petition, p. 15). In fact, the Court of Appeals, as one of several preliminary observations, noted that one of the distinctions between this case and *Brunswick* is that ESI's injury resulted from a violation of Section 1 of the Sherman Act (which by definition entails an actual restraint on competition) as distinguished from a violation of Section 7 of the Clayton Act (which only requires proof of *potential* anticompetitive effect). However, notwithstanding this distinction, the Court of Appeals went on to treat *Brunswick* as applicable to this case and, after careful analysis of the particular facts of this case, it concluded that ESI was injured by "that which makes defendant's acts unlawful" and that it had suffered "antitrust injury". (A22-30).

The Court cited other distinctions between this case and *Brunswick, viz*:

> "(2) Plaintiffs in *Brunswick* never proved that they had actually suffered any harm, but only that they had suffered defeat of their expectation of additional profits. Here, by contrast, plaintiffs suffered actual harm.[20] (3) There was no proof of anticompetitive behavior by defendant Brunswick; there was such proof here.[21] (4) In *Brunswick* there was no dimunition of competiton — the

[20] Compare this with the situation in *Brunswick*, where, as this Court pointed out, "responents complain[ed] that by acquiring the failing centers, petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration." 429 U.S. at 488, and where this Court recognized:

> "...competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished." 429 U.S. at 489, fn. 14.

[21] Compare this with the situation in *Brunswick*, where this Court was careful to point out that plaintiff had presented no evidence that defendant possessed an anticompetitive motive or that predatory conduct had been directed at the plaintiff. 429 U.S. at 479-480.

failing businesses were revived by the defendant and the plaintiffs continued as healthy enterprises. ESI went out of business not long after the alleged injury". (A24)[22]

Then, applying the *Brunswick* test, the Court observed that (unlike the plaintiff in *Brunswick*, which was injured as the fortuitous result of Brunswick's rescue of a failing competitor), ESI was eliminated as a competitor in the sale of minicycles precisely because it stood in the way of the proposed anticompetitive scheme to divide markets. As stated by the Court of Appeals (App. 25):

"ESI introduced evidence that not only had Bombardier and Agrati illegally conspired to allocate markets between themselves, but, as a necessary consequence, had determined to eliminate ESI as a competitor at the same time. Because of its exclusive distributorship with Agrati, ESI stood in the way of the conspiracy's aim to allocate the sales market for minicycles to Bombardier."

The Court of Appeals pointed out that ESI's injury flowed directly from that which made defendants' conduct illegal — Bombardier's and Agrati's desire and agreement to avoid competition:

"It was Bombardier's stance as an imminent potential entrant in the market which induced Agrati to succumb to Bombardier's blandishments. . . . It was Agrati's desire to stave off an immediate threat of competition by Bombardier which spurred it to cancel ESI and then agree to the strategy of declaring a default in November. It was Bombardier's urgent desire to put a summertime product on the market forthwith which led to the sudden excising of ESI as Agrati's exclusive dealer. . . . This was a quid pro quo: Agrati would surrender its current dealership with ESI in exchange for the promise of no competition from Bombardier and Bombardier would exchange its ability to enter the market against Agrati in exchange for the exclusive dealership as well as a promise of no competition from Agrati. In short, it was Bombardier's position as an imminent competitor which impelled Agrati to accede to its demands... And in order to accomplish the division of markets, it was necessary to deprive ESI of the Agrati product, which was done precipitously with no lead time thus depriving ESI of the opportunity to obtain its supplies from another source. The ineluctable result of the allocation of markets was that Agrati could no longer provide minicycles to ESI. *See United States* v. *Topco, supra*, 405 U.S. at 612, 92 S.Ct. 1135. We have here the type of *antitrust* injury which was found lacking in *Brunswick*." (A28-A30).

Bombardier now surmises that ESI was better off (once it was terminated) because it was spared from having to compete against both Agrati and Bombardier products. Petition, p. 16. However, the evidence establishes that it was Bombardier's threat of independent competition and its insistence on an agreement not to compete with Agrati which had caused ESI's termination and much of ESI's injury in the first place.

ESI's injury was "of the type which the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (429 U.S. at 489) for yet another reason. The purpose of the prohibition of non-competition agreements between competitors at the same level of trade (such as Bombardier and Agrati) is to prevent a reduction (or encourage a proliferation) of competitive products and competitors. The benefits of such increased competition flow not

[22] The Court of Appeals correctly stated:
"This situation is thus not akin to that in *Brunswick* where competition was actually fostered by the continued presence of the once-failing businesses. Here, competition was curtailed, both as between Agrati and Bombardier and in that ESI was driven out of business and thus eliminated as a competitor." (A28)

only to ultimate consumers, but to all those who (like ESI) participate in the competition between independent products and thereby have the opportunity to earn profit. As the Court of Appeals stated, Bombardier's conduct indisputably reduced the number of competitive products that would have been in the market and deprived ESI of the opportunity to participate in the competition between Bombardier products and Agrati products. (A27). ESI was, therefore, injured by the "anticompetitive effect" of the illegal agreement not to compete.

In dissenting from the Court of Appeals reaffirmation of its ruling on standing, Chief Judge Coffin further explained the Court's reasoning with respect to ESI. He said:

> "The underlying substantive antitrust violation which gave rise to this case was a horizontal agreement between Agrati and Bombardier to allocate territorial and product markets between themselves and terminate ESI's role in the distribution of Agrati minicycles. . . In this case, it is possible that the purchasers of minicycles, including ESI...would have benefited had Bombardier chosen to compete with Agrati rather than illegally agreeing not to do so. '[H]ad Bombardier and Agrati not so conspired, there would have been *two* minicycles...to choose from rather than the *one* that the conspiracy delivered up.' 605 F.2d at 14. In any event, ESI's bargaining power vis-a-vis Agrati most certainly would have been increased had Agrati not succeeded in securing Bombardier's agreement not to compete in the manufacturing and selling of minicycles.
>
> "This is not to say that ESI necessarily would have retained its ability to purchase minicycles for distribution. It is to say, rather, that the question whether ESI would retain that ability would have been determined by the forces of competition rather than by agreement between competitors. '[T]he freedom guaranteed each and every



> business, no matter how small, is the freedom to compete to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because [others so agree].' *United States* v. *Topco Assoc.*, 405 U.S. 596, 610 (1972). Because the damage to ESI caused by the Agrati-Bombardier Agreement was the loss of that freedom, we correctly found that it is able to recover antitrust damages against the defendants."

Moreover, as noted above, this Court in *Brunswick* stressed the absence of any anticompetitive motive by defendant or predatory conduct aimed at the plaintiff. Here, on the other hand, as part of the agreement not to compete, Bombardier and Agrati engaged in a course of pedatory conduct which, the jury found, was designed to drive ESI from the market. (Jury's Answer to Special Interrogatories No. 10, A11). The Court of Appeals said:

> "ESI introduced evidence of Bombardier's threats to enter the market independently againt the Agrati line unless Agrati agreed to do business with it. Bombardier urged Agrati to cut ESI off precipitously with no advance notice, thus depriving ESI of the opportunity to search for an alternate source of supply prior to termination. Bombardier then later attempted to dissuade Agrati from supplying parts to ESI which were contractually called for, even in case of cancellation. There was proof that Bombardier deliberately underpriced its Agrati cycle vis-a-vis the price of ESI's Broncco and that Bombardier used deceptive means for obtaining inventory, pricing and other information from ESI. In essence, as part of the territorial scheme, Bombardier worked to eliminate ESI as a viable competitive force in the minicycle market. Bombardier had indicated to ESI distributors that they would

no longer have exclusive rights to the Broncco and that Bombardier itself would soon be marketing the Agrati-made cycles. Bombardier released press statements that it would now be carrying the Agrati line. Had Agrati been free to sell in North America through its former distributor ESI, Bombardier could not have claimed exclusivity on the Agrati models nor intimidated ESI distributors with the threat of the loss of their exclusivity and their ability to obtain needed spare parts." (A26)[23]

Unlike the situation in *Brunswick*, the Court of Appeals properly concluded there was here

"...adequate evidence to support a finding that the territorial scheme with its corresponding unfair and anticompetitive behavior aimed at ESI, was a material factor in plaintiff's injury." (A-26).

Finally, there exist two independent grounds for finding that antitrust injury exists. First, in this case:

"ESI was offered inducements for acceding to the conspirators' wishes and only after refusing to do so was cancelled." (A25).

In this respect, the injury that ESI suffered is precisely the same type of injury suffered by the plaintiff in *Albrecht* v. *Herald Co.*, 390 U.S. 145, *reh. denied*, 390 U.S. 1018 (1968),

[23] As noted above, Bombardier's "contumacious behavior" (A40, fn. 27) did not cease with the filing of this lawsuit in January, 1971, or even with the District Court's issuance of a preliminary injunction in September of that year. Rather,

"[N]otwithstanding the fact that the [District] Court twice indicated that the injunction covered spare parts, both Bombardier and its subsidiaries continued to sell them, up until and after the time a motion for contempt was filed in February, 1972, by ESI." (A39-A40).



and the legion of other cases in which plaintiffs were awarded damages because they were terminated or otherwise punished for refusing to join in a conspiracy which is illegal *per se* under the antitrust laws. *See, e.g., Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969). It would seem far too late to argue that the plaintiffs in those cases did not suffer "antitrust injury". Those, and similar cases, are designed to preserve the freedom of individual market participants to compete independently. A refusal to sell to such a competitor in order to punish that competitor for not participating in an anticompetitive scheme — particularly an agreement not to compete — is indisputably "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the acts unlawful". *Brunswick*, 429 U.S. at 489.

Second, the Bombardier/Agrati agreement was, among other things, an agreement between potential competitors at the same level of trade which limited the customers to whom Agrati might sell. In *Topco*, this Court struck down the aspect of the Topco agreement which prohibited sales by Topco members (who were potential competitors) to third persons who proposed to purchase Topco products for resale to consumers. 405 U.S. at 612. *See also: Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In this respect, the Bombardier/Agrati agreement is precisely the same as the Topco agreement. ESI was injured by the "anticompetitive effect" of the Bombardier/Agrati agreement limiting the customers to which Agrati could sell. It was literally destroyed by that which made the agreement illegal.

Accordingly, additional independent bases for finding "antitrust injury" were presented here which the Court below noted but found unnecessary to decide. See A25-26, and additional cases there cited.

Moreover, in the context of the facts described above, the asserted "conflict" between the Courts of Appeals is

non-existent. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) [Petition, p. 13], involved a distributor which was unilaterally terminated by his supplier in favor of its own distributorship network following a merger. In the instant case, ESI was terminated because it was the obstacle to the effectuation of an anticompetitive scheme and ESI was intentionally driven out of business by unfair means.

The case is similarly distinguishable from the opinions in *Kirihara* v. *Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii, 1969) [Petition, p. 13], (where the Court stressed the complete absence of any purpose to coerce, or of any anticompetitive motive for the termination (at 78-79)), and *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938, *reh. denied*, 412 U.S. 945 (1973), [Petition, pp. 13-14] (a suit by a former employee of a merged company, where "no evidence [was] submitted intimating that appellant's discharge was for any reason other than the duplication of jobs occasioned by the merger" (at 728). The Court (at 730-731) expressly distinguished that situation from cases like the case at bar in which an "antitrust violation [had been] directed against the blackballed party").

The other district court opinions cited by Bombardier are not inconsistent with the Court of Appeals decision. In *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 384 (D. Del. 1978) [Petition, p. 14], the Court held that *Brunswick* is applicable to a Section 1 violation, but that the mere elimination of intrabrand competition by defendant there could not have injured, but could only have benefited the plaintiff (at 401-402). In the case at bar, the Court of Appeals also applied *Brunswick* to a Section 1 case, but found that the threat of interbrand competition was used as a club to obtain an agreement prohibiting such competition, and that the agreement severely injured ESI. *Murphy Tugboat Co.* v. *Crowley*, 454 F. Supp. 847 (N.D. Cal. 1978) [Petition, p. 15, fn. 10] also held that *Brunswick* is applicable to a Section 1 case, and that



plaintiff had failed to assert antitrust-type damages when it offered to prove that it "was compelled to charge competitive rates, [and] was precluded from increasing its rates to higher levels" and consequently lost profits due to defendant's failure to raise its own prices. The court expressly distinguished that situation (at p. 852) from cases "involving [a plaintiff's] partial or total exclusion from the market". In both *Hauer* v. *Bankers Trust New York Corp.*, 450 F. Supp. 103 (E.D. Wisc. 1978) and *Laughlin* v. *Wells*, 446 F. Supp. 48 (C.D. Cal. 1978), the Courts found that *Brunswick* was applicble, and held that, as here, plaintiff's injury arose as a direct result of the antitrust violation.

Indeed, all of the Circuit Courts which have applied *Brunswick* to Section 1 violations similar to that presented here, are in agreement that *Brunswick* should not be construed so as to deny relief to a distributor in ESI's position. See *Lee Moore Oil Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1301-1304 (4th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 831-833 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

## III. The Petition Should Be Denied Because There Were Independent Grounds for Affirming the Judgment Below.

ESI alleged and proved that Bombardier, in addition to agreeing not to compete with Agrati, also violated Section 1 of the Sherman Act by conspiring to eliminate ESI as a competitor in the mincycle market. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

This aspect of ESI's case was submitted to the jury under the "rule of reason" standard expressly approved by *Whitten, supra* at 562, and by many other courts which have addressed this type of antitrust violation. See *Tower Tire And Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F. Supp. 1098

(S.D. Tex. 1975); *Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975); *Snyder* v. *Howard Johnson's Motor Lodges, Inc.*, 412 F. Supp. 724 (S.D. Ill. 1976); *La Preferida, Inc.* v. *La Victoria Foods, Inc.*, 1978-2 Trade Cas. para. 62,240 (N.D. Ill. 1978); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir.) *reh. denied*, 579 F.2d 643 (1978), *cert. denied*, 439 U.S. 1116 (1979); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 1978-2 Trade Cas. para. 62,151 (S.D.N.Y. 1978); *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 481 F. Supp. 1297 (D. Mass. 1980).[24] The trial judge properly instructed the jury on the requisite elements of a rule of reason case,[25] and the jury made the following specific findings: (1) that Bombardier and Agrati conspired to drive ESI out of the business and used unfair means to do so (Special Interrogatory No. 10, A11); (2) that ESI's Broncco minicycle competed in a relatively narrow submarket which did "not include the Yamaha Mini-Enduro and Honda Trail '70 but did include minicycles such as Indian, Yankee Boss, and Premier BB" (Special Interrogatory No. 13, A12); and (3) that competition in that submarket was significantly lessened as a result of the conspiracy (Special Interrogatory No. 14, A12). The jury concluded "that Bombardier injured ESI by conspiring with Agrati-Garelli to eliminate ESI as a competitor". (A11).

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[24] Since ESI's claim was submitted to the jury under the "rule of reason" standard, it is not necessary to consider the additional question raised by some of the cited cases, namely, whether conspiring to eliminate a competitor by unfair means might also constitute a *per se* violation of the Sherman Act. While *Whitten* and several other cases have held that a *per se* rule would apply to the facts of this case, all of the cases agree that a violation may be shown, as it was here, under the "rule of reason" approach.

[25] The judge instructed the jury as follows (App. 3889-90):

> "So those are the essential elements on this last claim: conspiracy; intent and purpose of the conspiracy; object is to eliminate a distributor by unfair means; and having a significantly damping or suppressing effect on competition in the affected submarket, which you must decide upon for reasons that I have just explained."



Despite the District Court's ruling in denying defendants' post-trial motions that "the proper fact questions were submitted to the jury and that its answers were supported by substantial evidence", (App. 1217), petitioner continued to claim below that the jury could not reasonbly have made the above findings. The Court of Appeals found it unnecessary to reach this question (A32-A33), although it did rule that the jury properly concluded that "defendants injured ESI by conspiring with Agrati not to compete and to eliminate ESI as a competitor". (A11, 25-27).

ESI submits that the jury's findings amply support its conclusion that Bombardier violated Section 1 of the Sherman Act. See *Whitten* v. *Paddock Pool, supra*. There is, therefore, an entirely independent basis for sustaining the judgment below.

## Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

THAYER FREMONT-SMITH
ROBERT S. FRANK, JR.
JAMES A. MCDANIEL
CHOATE, HALL & STEWART
60 State Street
Boston, MA 02109
(617) 227-5020

APPENDIX I

# United States Court of Appeals
## For the First Circuit

No. 78-1492.

ENGINE SPECIALTIES, INC., ET AL.,

PLAINTIFFS, APPELLEES,

*v.*

BOMBARDIER LIMITED, ET AL.,

DEFENDANTS, APPELLANTS.

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge* and
PETTINE, *District Judge.**

ORDER

Entered September 21, 1979

The petition for rehearing is granted, but is limited to the filing of memoranda or briefs only. There will be no oral rehearing. The parties are granted leave to file supplemental memoranda or briefs on the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory.

Memoranda or briefs shall be filed on or before October 9, 1979.

By the Court:
DANA H. GALLUP, *Clerk*

By /s/ FRANCIS P SCIGLIANO
*Chief Deputy Clerk.*

*[cc: Messrs. Vanderstar, Fremont-Smith and Galvani.]*

*Of the District of Rhode Island, sitting by designation.

Supreme Court, U. S.
FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1600

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BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
*Petitioners,*

v.

ENGINE SPECIALTIES, INC.,
*Respondent.*

---

## REPLY BRIEF FOR PETITIONERS

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JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

*Of Counsel:*

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

May 1980

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*Respondent*.

---

## REPLY BRIEF FOR PETITIONERS

---

Respondent's opposition to the petition for certiorari raises four points: (1) that the Court lacks jurisdiction to entertain the petition because it was untimely filed; (2) that petitioners waived their objections to the district court's instructions on the *per se* rule against division of markets and on the requirement of antitrust injury under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); (3) that there is indeed a *per se* rule which prohibits a manufacturer from entering a new field through a joint venture with a manufacturer already in the field if the first manufacturer could have entered with its own product; and (4) that the court of appeals' decision on *Brunswick* was proper and does not conflict with the decisions of other circuits.

We have already dealt adequately with the third and fourth points in our petition.[1] Neither the jurisdictional point nor the waiver point has any validity, as we briefly demonstrate below.

**1. The Court Has Jurisdiction To Entertain The Petition.**

On July 26, 1979, the court of appeals entered a single judgment, *nunc pro tunc* July 25, 1979, which both affirmed that part of the district court's judgment in favor of plaintiff-respondent Engine Specialties, Inc. ("ESI") on its division-of-markets claim and reversed that part of the judgment in favor of co-plaintiffs Durham and Watercraft, who were sub-distributors under ESI and who relied on the same division of markets theory. (Pet., App. B) [2] All three plaintiffs were represented by the same attorney. On August 3, 1979, Durham and Watercraft filed a petition for rehearing under F.R.A.P. 40, thus staying the mandate. After briefing, on February 21, 1980, the court of appeals affirmed the corrected judgment entered on July 26, 1979, *nunc pro tunc*. (Pet., App. C) Four days later, petitioners moved for a further stay of mandate pending application for a writ of certiorari from this Court. That motion was granted and the mandate was stayed to April 14, 1980, on condition that the petition for a writ of certiorari be filed by that date (Pet., App. D), which was done.[3] At

[1] We note that respondent has still not been able to find a case holding that the *per se* prohibition against horizontal divisions of markets applies when one of the agreeing parties is a "potential" entrant only in the sense that it could have entered the market by manufacturing a product it had never before manufactured or sold.

[2] The petition for certiorari will be cited as "Pet." and appendices therein shall be cited as "App. ——." The opposition to the petition will be cited as "Opp."

[3] Durham and Watercraft filed a cross-petition on May 21, 1980, No. 79-——.



no time between July 26, 1979, and February 21, 1980, did the court of appeals issue a mandate, nor did respondent seek to execute on that portion of the judgment rendered in its favor.

Respondent's jurisdictional argument is simply wrong on both the law and the facts. A timely-filed petition for rehearing suspends the judgment and tolls the running of the ninety-day period within which a petition for certiorari must be filed. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942); *Forman* v. *United States*, 361 U.S. 416 (1960).

Respondent cites no case in which the Court has refused to consider a petition for certiorari filed within ninety days of a court of appeals ruling on a timely petition for rehearing. Instead, it relies on *F.T.C.* v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952), a case which has no application here, and *United States* v. *Adams*, 383 U.S. 39 (1966), a case which supports the exercise of jurisdiction here.

In *F.T.C.* v. *Minneapolis-Honeywell Co.*, the Court ruled that a paper filed with the court of appeals after the time for requesting a rehearing had past, which simply sought and prompted court action that could not and did not affect the merits of the decision challenged in the petition for certiorari, could not be characterized as either a petition for rehearing or as a motion to amend judgment. Thus, the Court refused to entertain a petition for certiorari filed more than ninety days after the court of appeals' initial and only decision on the merits. 344 U.S. at 211.

In *United States* v. *Adams*, a case in which the court of appeals initially ruled on the validity of a patent and subsequently, on a motion to amend judgment, ruled on related contract issues, the Court entertained a petition for certiorari filed within ninety days of the second judgment because the motion to amend was timely filed

and the patent and contract issues were "inextricably linked". 383 U.S. at 41-42.

Here, as in *Adams*, the petition for rehearing was timely filed and the issues raised therein are closely related to the issues raised in the petition for certiorari. The petition for rehearing sought a redetermination of the standing of respondent's co-plaintiffs. As such, it necessarily raised questions central to the court of appeals' basic approach to antitrust liability and injury and thus provided an opportunity for the court to expand upon the antitrust concepts it applied in the case. Indeed, the opinion of Chief Judge Coffin, dissenting to the denial of the petition for rehearing, addressed the division-of-markets theory under which petitioner had been held liable to respondent. *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 615 F.2d 575 (1st Cir. 1980). The Chief Judge's reasoning, had it been adopted by the majority, would have affected the posture of the petition now presented to this Court.

In short, there is no question that this Court has jurisdiction to entertain the instant petition.

**2. Petitioners Did Not Waive Their Objections To The Trial Court's Rulings On The Per Se Rule And On Brunswick.**

Respondent places heavy reliance on its assertion that petitioners waived both issues they raise in the petition for certiorari. The very portions of the record on appeal which respondent cites, however, flatly contradict its contentions and indeed show that respondent's various factual assertions cannot be accepted at face value.[4]

[4] Although we hesitate to burden the Court with record details at this stage of the proceedings, we have attached as Appendix E to this brief the trial transcript respondent cites (Opp., p. 14) on waiver issues to show conclusively that respondent's contentions are untrue.



Respondent first asserts that petitioners conceded that the trial court could properly instruct the jury that an agreement not to compete between potential competitors was a *per se* violation. (Opp., p. 14) As we pointed out in our petition, petitioners did not waive their objection to the trial judge's instruction on this point and instead made their objection in the proper manner and at the proper time. (Pet., p. 7 n.3; App. E13).

Respondent also contends that petitioners waived the *Brunswick* argument in the trial court. (Opp., pp. 24-26) Respondent states that (a) it contended that antitrust injury did result if Agrati's decision to terminate respondent's contract was caused by Agrati's fear of petitioners' entry into the market, (b) petitioners conceded that if the jury were given such a causation instruction, petitioners would be satisfied, and (c) the trial judge in fact gave such an instruction.

The first two statements are true. The third is demonstrably untrue. The trial judge never gave such an instruction to the jury. Nowhere in the judge's instructions cited by respondent in its brief and included herein as Appendix E, did the judge instruct the jury that it must find that petitioners' threat to enter the market caused Agrati to terminate respondent's contract. Thus, of course, petitioners could hardly object. Absent such an instruction, there was no basis, under *Brunswick*, on which the jury could find that the division of markets caused compensable antitrust injury to respondent, and it is the court of appeals' failure to so rule that is at issue here.[5]

[5] Respondent also asserts that the court of appeals stated that Bombardier's conduct "deprived ESI of the opportunity to participate in the competition between Bombardier products and Agrati products." (Opp., p. 30) Counsel for ESI was specifically asked by the trial judge if it was making such a contention, and counsel disclaimed any such intention. More-

Thus, it is clear that petitioners did not waive their contentions now raised on petition for certiorari. Respondent's distortions of the record should not overshadow the basic questions at issue: Did the court of appeals create a new, anti-competitive, *per se* rule? Did it misapply the *Brunswick* doctrine?

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

*Of Counsel:*

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

May 1980

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over, the court of appeals at no time indicated that ESI was so deprived or that it would have benefited from the competition that might have resulted from the introduction of both Bombardier and Agrati products. It only states that ESI was eliminated from competition generally—because it went out of business.

# APPENDIX

# APPENDIX E

## Excerpts from the Consolidated Appendix on Appeal Cited in Respondent's Opposition to the Petition *

[3863] [THE COURT] . . . antitrust purposes, and I will elaborate on that in a minute, is the one that was initiated on the 14th of November, and the statements to which I have made reference occurred in mid-September, so there is another illustration of the importance of chronology here.

Now turning to the specifics of the first claim under Count 2, that has to do with the division of markets. The law is that there are some types of agreements which, without more, are violations of the antitrust laws. The best illustration is an agreement to fix prices, but another type of agreement which is what is called a per se violation, a sort of ipso facto violation, of the antitrust laws is an agreement to divide markets, to divide up a market, because divisions of markets, that is to say, an agreement between two competitors that they won't compete with each other automatically results in a lessening or suppression of competition, which is exactly what the Congress intended to prohibit when it passed the antitrust laws, so that type of agreement is a violation of the antitrust laws, no matter what the market or what the geographical market or the dimensions of the market in which the competition exists.

You have got people who are competitors agreeing to compete, and without more, they are held to have [3864] violated the antitrust laws, and in this case, the agreement of November 14, 1970 between Agrati-Garelli and Bombardier was on one condition a violation of the antitrust laws, and the condition is, if Bombardier and

---

* Page numbers from the Consolidated Appendix appear in brackets.

Agrati-Garelli were competitors, or if they were potential competitors—and, of course, the claim here of the plaintiff is that although Bombardier was not already in the fall of 1970 a competitor in the same market with Agrati-Garelli, it was a potential competitor because it had both the intent and the ability to market a minicycle which would compete with the minicycles being made by Agrati-Garelli and being sold by the plaintiff.

There is a second essential element to the plaintiff's claim, and that is to establish that the conspiracy resulted proximately in terms of the proximate cause that I have just defined: and injury to the plaintiff's business or property of a type which the antitrust law was designed to prohibit or forbid.

You will recall, and there is no need to get into it in detail, that the agreement that was initiated on November 14th said that in essence, Agrati-Garelli and Bombardier wouldn't compete, that Agrati-Garelli wouldn't sell in competition with Bombardier in North America, and Bombardier wouldn't sell in competition with Agrati-Garelli in Europe or outside of North America, and that [3865] should certain new types of motorcycles be developed, depending on the type, one and not the other would make it, and in all events they wouldn't compete against each other.

So you see that is, if they are competitors, a per se violation of the antitrust laws, and the plaintiff, if there is a per se violation, will have established its case under Count 2, provided it demonstrates that it suffered injury to its business or property of the type which the antitrust law was designed to guard against.

So there are really two principal issues on this division of markets claim that is urged by the plaintiff under Count 2. The first is, was Bombardier within the meaning of the rules here a potential competitor of Agrati-Garelli



of the type whose agreement with Agrati-Garelli would amount automatically to a violation of the antitrust laws; and the second is, in consequence of the conspiracy, was there antitrust type injury done to the plaintiff.

Now, understandably, the plaintiff says yes, Bombardier was a potential competitor of Agrati-Garelli. It was on the threshold of entering the same submarket with the Fun-Doo. You will remember that that name apparently was never publicized, but I am going to call the—for convenience, I will call the Bombardier vehicle [3866] the Fun-Doo.

Remember that the claim of the plaintiff and the alleged liability of the defendant in this branch of the case is not dependent on the nature of the submarket. It is not dependent upon whether there was a submarket that the plaintiff contended for, and I will read you that one in a moment. Well, maybe I should read it to you right now.

Plaintiff says that the submarket here was small, two-wheeled vehicles. Let's call them two-wheeled motorcycles. Let's call them small motorcycles, two-wheeled vehicles, small motorcycles with modified motorcycle styling, that is to say, small ones, but they would still look like a motorcycle, two-stroke engines of approximately 50-cc or less, and seat height and wheelbase suitable for adults and children, having features and customer groups which make them a distinct submarket of small motorcycles.

I will talk more about that when we discuss the third or fourth claim of the plaintiffs, in considering they have got two claims under Count 1 and two claims under Count 2, and what I am talking about now is the first, that is, the first of the conspiracy claims based on the antitrust laws, but that issue with respect to the nature of the submarket is not part of this third [3867] claim.

So, as I was saying, the parties have different positions on this issue, and let me say further that the plaintiff must show that Bombardier—by a preponderance of the evidence, that Bombardier had a potential of competing with Agrati in the first half of 1971, that is to say, in the spring or summer of 1971. That must be shown in this case. That is the cause of the type of injury which the plaintiff must show as part of his case, the so-called Brunswick requirement. That is the name of the Supreme Court case that you need not concern yourselves about, but I say that so that the basis for my giving that instruction appears in the record.

So plaintiff says you must determine whether Bombardier had the ability and intention to manufacture and sell a small motorcycle product in the United States in or after 1971—well, I have changed that, so you must find it would be during the spring or summer of 1971—which would have competed with some Agrati product regardless of whether they were minicycles, minibikes, lightweight motorcycles, or whatever.

In assessing Bombardier's ability to make or sell—excuse me, I should say to make and sell a product in competition with Agrati-Garelli, you may consider evidence of Bombardier's having developed a prototype vehicle and tested [3868] it, with good results; its having tested vehicles made by other manufacturers; its having the production capacities to make practically all parts of a motorcycle.

You may consider the testimony of Beaudoin, the President of Bombardier, that it was the November 1970 agreement between his company and Agrati which caused Bombardier not to manufacture its own Fun-Doo, and that the Fun-Doo had the same general dimensions and appeal and appealed to the same general market as the Broncco minicycle.



If you find that Bombardier had the ability and intention to enter the market with a motorcycle product of its own which would have competed with that of Agrati-Garelli's products, then you should conclude that Bombardier was a potential competitor of Agrati-Garelli. The crux is the ability and intent.

The defendant does not contest the principal of law, that is to say, that competitors and potential competitors may not divide markets without violating the antitrust laws, but the defendant's position is that it is the law but it doesn't apply here because Bombardier was not at all that ready and able to get into the market.

Bombardier takes the position that its getting into the market, with all of the problems of starting up a new product, was way down the road, maybe a year or two. [3869] In that respect, there are internal memos within the Bombardier organization which you may remember, and you don't have to remember. You can just take a look at the index of the exhibits when you come back here on Monday, and you will find a nice index of all these exhibits, and they will be in a nice cardboard box or some other container, so when you want to, if you do want to, say, "Now, what was the substance of that memo? " you just look it up on the index and pull it out, and you will be able to read it.

So the issue is, was Bombardier a potential competitor in the sense that I have stated, and the defendant says here are some of the factors you should consider or some of the questions that you should ask yourselves. Did Bombardier have the manufacturing capacity to produce the product in question, meaning the Fun-Doo that would sell? Did Bombardier have it developed already? Did it have in its employ sufficient personnel with the necessary experience to carry out the manufacturing? Did Bombardier have the capacity to sell the product effec-

tively through its existing distribution organization? And had the company already made a decision, or was it still debating internally whether to enter the market with a product of its own manufacture?

In considering these questions, the more you answer [3870] yes, the greater the likelihood that the company was a potential competitor, and vice versa.

So that is one of the key questions on that. If you find that Bombardier was a competitor as defined, then there has been a violation of the antitrust laws.

Does liability of the defendant to the plaintiff therefore follow automatically? The answer is no. There must be two things proved, that is, the conspiracy to violate the antitrust laws as just described, plus this element of injury, and it is the injury on account of the anticompetitive effect of the conspiracy or the agreement. And somewhere here, I have a recent Supreme Court case, in the January 25, 1977 issue of the looseleaf service called Law Week that gives us the recent opinions of the Supreme Court of the United States.

On January 25th, six weeks ago, the Supreme Court decided an antitrust case having to do with bowling alleys, Brunswick Corporation against the Pueblo Bowlamat, Inc., and it discussed quite comprehensively the nature of the essential element that the plaintiff must prove in antitrust cases, including this case.

This principle, I might say, is applicable to this division of markets claim. It has no applicability to the fourth claim, that is to say, the one that I will discuss after a short recess.

[3871] The Supreme Court says here: "Plaintiffs must prove antitrust injury," and the word "antitrust" is italicized, "which is to say injury of the type the antitrust laws were intended to prevent, and that flows from



that which makes the defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

And here is the practical application of that principle in the facts of this case. The plaintiffs must show that they were injured as a result of the conspiracy, and it was a conspiracy to divide up markets, and the defendant says, in effect, what of it? Here, says the defendant, the injury which the plaintiff suffered was unrelated to the division of the market between Agrati-Garelli and Bombardier. Let's not forget that the division is by the two manufacturers.

So, says the defendant, let's assume that, and let's concede for purposes of the argument that there was a violation of the antitrust laws because Bombardier was a potential competitor. What of it? As a result of the agreement, what happened was that Bombardier never put its Fun-Doo on the market, but what difference does that make to the plaintiff? goes the defendant's argument. The absence of the Fun-Doo isn't what hurt the plaintiff [3872] here. It is the fact that his source of supply from Agrati-Garelli was cut off.

So the per se violation of dividing up world markets, goes the defendant's argument, didn't cause any injury to the plaintiff. The plaintiff's injury says the defendant, is no different than if Agrati-Garelli decided on its own to dump the plaintiff, that is to say, to breach a contract with him or to enter into an exclusive distributorship with some other business other than Bombardier.

So that is the question you must decide. Is the type of injury suffered by the plaintiff the type that the Congress wished to prevent when it made illegal agreements to divide up markets.

Plaintiff submits on this point that as a result of the agreement, there were only two manufactured prod-

ucts instead of one. I am sorry, that is just exactly wrong. There was only one manufactured product instead of two. Plaintiff says if it hadn't been for this agreement, you would have had a Fun-Doo, with its improvements in the course of experience, you would have had the Broncco, that is, the Agrati-Garelli product, with its improvements, and competition would thereby be increased, and it would be beneficial to the plaintiff and to customers generally.

[3873] Plaintiff also says that it was only as a manufacturer with an enormous balance sheet and bank account and dealer organization that Bombardier was able to threaten Agrati-Garelli into entering into their agreement with Bombardier, that it was the status of Bombardier with its large economic muscle that—and the misuse of that strength, you see, which served to damage and injure the plaintiff.

And further, says the plaintiff, not only did the agreement result in only one product instead of two, as between these two manufacturers, but there was additional damage to the plaintiff of an antitrust nature when plaintiff found itself competing with the identical products that it was selling.

And lastly, says the plaintiff, the direct consequence of the agreement was to cut off the plaintiff from its source of supply, and, as a practical matter, guarantee its insolvency and ultimate dissolution. You will remember the plaintiff went out of business a couple of years after, maybe two or three years after, these events, but, says the plaintiff, it was a one-way street. Once we lost our Agrati-Garelli line, we did our best, but our failure was inevitable, pretty much, and the defendant, in effect, says, that is a lot of nonsense. What put the plaintiff out of business was the plaintiff's

* * * *



[3904] [THE COURT] the agreement. It is just that the distributor—it was an agreement at a different level, the manufacturer level, and for the plaintiff to have refused to join the conspiracy I think may have been irrelevant to the particular conspiracy, again, in view of the Brunswick point, but you may be right. I am just not sure.

I have some doubt that I will get into that separately, but that is the first thing I will at a later point ask Mr. Vanderstar to comment on.

What is your next point?

MR. FREMONT-SMITH: Our Requests No. 46 and 47, defining what is injury, and I think this goes back to the point as to whether we have to be put out of business or—

THE COURT: Well, I will correct that.

MR. FREMONT-SMITH: —or our lost—

THE COURT: Fewer profits or greater losses. I know that.

MR. FREMONT-SMITH: I think you did say it only has to be one factor in causing our injury, there could be other factors.

[3905] Number—I think it was No. 16, where we have requested a specific instruction that parties to a contract have to live up to it in good faith, and there was—your Honor did not mention good faith with respect to live up to a contract.

Your Honor, on the need of conspiracy in the Paddock Pools, your Honor laid it all on the conspiracy between Agrati and Bombardier, whereas the conspiracy could also have existed for the dirty tricks between Bombardier and Bombardier East.

THE COURT: Yes, but that is the first time I heard of that. Richard and I talked about that at some length,

and neither of us could recall your ever having alluded to that. We may be mistaken. Maybe you have in the past.

MR. FREMONT-SMITH: There were meetings between Bombardier—

THE COURT: No. I am talking about making the argument. This is to us a brand new argument. It is one that we discussed as a potential argument. I just don't think we ever heard the plaintiff make it.

[3906] MR. FREMONT-SMITH: Well, evidence is there from which they could find a conspiracy between Bombardier and Bombardier East.

THE COURT: Well, that was my best understanding of the record.

MR. FREMONT-SMITH: Your Honor, I would also take exception to your Honor's statement that if the broader—under Paddock Pools, if the broader market were the one they found, driving us out of business would not be significant on competition. We think driving anybody out of business would be a significant effect on competition even under the broader market, including Honda and Yamaha.

THE COURT: Well, as you know, it is difficult there under Whitten, but we thought that there had to be an adverse effect. That is the difference between the per se and the rule of reason, you know, facets of Whitten, in our view, and that is that if you got a significant factor in the market doing bad things, that is, per se, if it is not significant, there is [3907] no requirement of a significant factor—it becomes a violation under the rule of reason only if there is a suppression of competition in the market.

I think it is dependent upon what the market is, that is all. I cannot really be sure you are wrong, but I don't think you are right.



MR. FREMONT-SMITH: Mr. Frank has— Can he express one point rather than whisper in my ear?

THE COURT: Yes. Don't whisper in my ear.

MR. FRANK: On the question that your Honor suggested was relevant in determining relevant market, that is, whether the Broncco type of vehicle competed in its own pool or whether it competed in a larger pool with the Yamaha and the Honda, we submit that the question —that that is an improper casting of the question, because both of those markets may be relevant, both of those markets may be arenas in which competition takes place. The only question is whether the market for which [3908] we contend is also relevant.

THE COURT: So what do you want me to say? That is what the rule requires, that you tell me what you want me to say. You make an interesting point, but what would you like me to say?

MR. FRANK: We would want you to pose the question as we posed it in our suggested interrogatory to the jury: Whether by means of—whatever the appropriate characteristics are, by means of its distinctive characteristics, distinctive customer groups, small two-wheeled vehicles with motorcycle type styling and so on constitute a relevant product market; and further, that that may be a relevant product market even though there are other relevant product markets which might include other vehicles.

THE COURT: All right. That doesn't mean I will give it. That means I understand it.

Now any more?

MR. FREMONT-SMITH: That is it, your Honor.

THE COURT: Now before I hear from [3909] Mr. Vanderstar, I would like you to comment on the Parke-

Davis point, not now but at some point before you conclude, to state a view on that, and then I don't need your comments on other things. I have already made up my mind whether or not to give other requests proposed here at the side bar by plaintiff's counsel.

MR. VANDERSTAR: All right, then. The objections of Bombardier Limited to the charge as given, your Honor, are these: No. 1, under the Count 1, the failure to charge that an element of the tort is a purpose to cause the plaintiff the specific type of harm that the plaintiff actually suffered. We think that is the law under the Pennsylvania cases.

Now turning to the charge under Count 2, a number of points. A couple of, let me say, preliminary points, failure to give what I call the Sears-Compco charge.

There are sufficient references in your Honor's charge to unfair means of competition and things like that, but I think it would be appropriate to include [3910] a charge that copying another company's product if it is not patented is specifically not unfair, so that—for obvious reasons.

Secondly, another general point, that the antitrust laws are designed to protect the competition and not competitors. You may have covered that in other ways by saying companies go out of business all the time, but I think the difference between the tort and the antitrust in that regard could be—should be emphasized.

On the division of markets, I have a number of problems with the charge. The first is really kind of a factual one. I think your Honor has pretty well instructed the jury that the November 14, 1970 agreement, or, as you called it, an agreement was a horizontal division of markets.

I think on its face it is not. I think it is a document that the jury would have to read and consider before



concluding whether or not it was. There is nothing in that document that prevents Bombardier from competing with Agrati in Milan, for [3911] that matter, Italy, and indeed I am not even sure that the later modifications expressly prohibit Bombardier from competing outside of North America, so I think that it is most unfortunate to characterize that document, especially the November 14th version of it, as an explicit division of the world markets.

There is a related point, and that is that although your Honor gave what I call the joint venture charge, I think our objection on that is the failure to connect that to the division of markets charge. I think the jury has the impression that the November 14th agreement is a division of markets and is a per se violation if, and the only if is if Bombardier was a potential entrant.

I think on the contrary, the document is, on its face, a joint venture agreement which can have a procompetitive effect even if it has an incidental division of markets flavor to it.

So that there is a whole lot more that is in doubt on the division of markets [3912] point than the mere question whether Bombardier was a potential entrant. Indeed, the what I call the toehold point.

THE COURT: Well, I liked that setting out in your requests, I really did. I almost gave it. I really did. I almost did. I liked it. I don't think it is quite relevant, though, you see. It is close, but what is your next point? I mean I didn't give it.

MR. VANDERSTAR: It is the toehold point. We contend the market is a fairly broad one, and you got a little tiny company which is being—that is, ESI, which is theoretically being replaced by Bombardier, which is a good bit bigger and potentially offers more vigorous competition to others in the market, Honda and others.

THE COURT: All right. What is the next one?

MR. VANDERSTAR: On the second antitrust claim, we object to the failure to charge that the plaintiffs must show the defendant was a significant factor in the [3913] market. We went at this yesterday, and I knew what your Honor's view was, but, for the record, we object to that.

We also object, and this is kind of the converse of the point Mr. Fremont-Smith made, we object to your charging the jury that the substitution of Bombardier for ESI, even prior to the strike, the substitution of Bombardier for ESI in the narrow market was a lessening of competition. I don't think that substituting one company for another is ever considered to be a lessening of competition. If you had six companies, you still have six, and, indeed, you may have one of them that is stronger and better able to compete than you did before, so that to me, it is almost per se the other way around.

But at least the point ought to be left open for the jury to decide rather than to have them instructed, in effect, that that was the lessening.

THE COURT: I agree. I will talk about that.

MR. VANDERSTAR: So do you want me to [3914] talk about it?

THE COURT: I say I will agree with you, and I will talk about that.

MR. FREMONT-SMITH: Your Honor, could I be heard about one before you give—

THE COURT: No, no.

MR. FREMONT-SMITH: There could have been seven competitors rather than six.

THE COURT: All I am going to tell them is, it is a jury question.



MR. FREMONT-SMITH: All right.

MR. VANDERSTAR: One final point. I think your Honor went too far in characterizing the testimony of the defendant's experts. I don't think they agreed with the plaintiff's position that there was this narrow submarket.

THE COURT: I didn't say they agreed. I said they lent some support. I used—

MR. VANDERSTAR: Mr. McCormack completely rejected the 50-cc thing and said there is a Suzuki 120 that competes.

THE COURT: Whatever I said probably wasn't complete, but there were elements

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